

Exhibit 4

Pearson Deposition Transcript (with exhibits)

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE:)
ASCENTRA HOLDINGS, INC. (IN) CASE NO. 21-11854
OFFICIAL LIQUIDATION),) (DSJ)
) CHAPTER 15
DEBTOR IN A)
FOREIGN PROCEEDING)
)

DEPOSITION OF

KATHARINE LUCY BLADEN PEARSON

AUGUST 8TH 2023

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1 UNITED STATES BANKRUPTCY COURT
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9 DEBTOR IN A)
10 FOREIGN PROCEEDING)
11)

12
13 DEPOSITION OF
14 KATHARINE LUCY BLADEN PEARSON
15 ON
16 TUESDAY, AUGUST 8TH 2023
17

18 TAKEN AT THE OFFICES OF:
19 PILLSBURY WINTHROP SHAW PITTMAN LLP
20 TOWER 42, LEVEL 23,
21 25 OLD BROAD STREET, LONDON EC2N 1HQ
22

23 MAGNA LEGAL SERVICES
24 866-624-6221
25

1 A P P E A R A N C E S
2

3 ON BEHALF OF THE PETITIONER (GRAHAM ROBINSON):
4

5 PILLSBURY WINTHROP SHAW PITTMAN LLP
6 31 WEST 52ND STREET
7 NEW YORK, NY 10019-6131

8 BY: MR. HUGH MCDONALD

9 MR. JOHN PINTARELLI

10

11 TWENTY ESSEX

12 20 ESSEX STREET

13 LONDON WC2R 3AL

14 BY: MISS BLAIR LEAHY

15

16 ON BEHALF OF THE DEBTOR:

17 PACHULSKI STANG ZIEHL & JONES

18 780 THIRD AVENUE

19 34TH FLOOR

20 NEW YORK

21 NEW YORK 10017-2024

22 BY: MR. JOHN A. MORRIS

23 MISS BETH LEVINE

24 MR. JEFFREY DINE

25

1 HARNEY WESTWOOD & RIEGELS
2 3RD FLOOR
3 HARBOUR PLACE
4 103 SOUTH CHURCH STREET
5 GRAND CAYMAN
6 HY1-1002
7 CAYMAN ISLANDS
8
9 BY: MR. ANDREW JOHNSTONE
10 MISS MINA WU (VIA ZOOM)

11
12 COURT REPORTER:

13
14 AMY COLEY
15 MARTEN WALSH CHERER LTD
16 2ND FLOOR
17 QUALITY HOUSE
18 6-9 QUALITY COURT
19 CHANCERY LANE
20 LONDON WC2A 1HP
21
22
23
24
25

I N D E X

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1 THE COURT REPORTER: WE ARE GOING
2 ON THE RECORD AT 10.11 A.M.

3 MR. MCDONALD: COURT REPORTER,
4 COULD YOU PLEASE SWEAR THE WITNESS?

5 MISS KATHARINE LUCY BLADEN PEARSON, SWORN
6 QUESTIONS BY MR. MCDONALD
7 BY MR. MCDONALD:

8 Q. HI, GOOD MORNING. MY NAME IS HUGH
9 MCDONALD. I AM WITH PILLSBURY WINTHROP SHAW
10 PITTMAN. WE HAVE JOHN PINTARELLI, AND BLAIR LEAHY
11 OF TWENTY ESSEX. WE REPRESENT GRAHAM ROBINSON,
12 WHO IS STANDING AT THE END OF THE TABLE HERE AS
13 THE LIQUIDATOR OF ASCENTRA HOLDINGS.

14 WE ARE HERE TODAY FOR THE KATIE
15 PEARSON'S DEPOSITION.

16 JUST A FEW GROUNDS RULES. THIS IS
17 AN AMERICAN DEPOSITION, PRODUCED IN AMERICAN
18 PROCEEDING. YOU MAY NOT BE TOTALLY FAMILIAR WITH
19 THAT, BUT YOU ARE UNDER OATH. YOU HAVE SUBMITTED
20 TO US COURT JURISDICTION, SO YOU ARE SWEARING TO
21 TELL THE TRUTH UNDER US LAW. DO YOU UNDERSTAND
22 THAT?

23 A. YES.

24 Q. OKAY. WE WOULD LIKE TO HAVE THE
25 DEPOSITION TRANSCRIPT READ AND ANY CORRECTIONS

1 MADE AND SIGNED, AND RETURNED TO US, JUST IN CASE
2 SHE IS UNAVAILABLE AT THE TIME OF THE HEARING, IF
3 THAT IS OKAY?

4 MR. MORRIS: NO PROBLEM.

5 MR. MCDONALD: OKAY.

6 BY MR. MCDONALD:

7 Q. AS FOR OBJECTIONS, WE WOULD LIKE TO
8 PRESERVED ALL OBJECTIONS UNTIL THE HEARING. THERE
9 MAY BE OBJECTIONS TO THE FORM OF THE QUESTION.
10 YOUR COUNSEL MAY HAVE TOLD YOU THAT. PLEASE
11 CONTINUED TO ANSWER AT THAT POINT.

12 A. SURE.

13 Q. OKAY. AS WITH EVERY AMERICAN
14 DEPOSITION, YOU ARE UNDER OATH. YOU REMAIN UNDER
15 OATH DURING THE ENTIRE COURSE OF THE DAY, SO THAT
16 IS IN CONSULTATION WITH YOUR COUNSEL.

17 A. YES.

18 Q. WE WOULD ANTICIPATE THE ONLY TIME
19 YOU WILL BE CONSULTING WITH COUNSEL, AND I CANNOT
20 EVEN IMAGINE THIS OCCURRING, WOULD BE ATTORNEY
21 CLIENT PRIVILEGE QUESTION, BEING AN EXPERT.

22 A. OKAY.

23 Q. OKAY?

24 A. YES.

25 Q. WE WILL BE TAKING REGULAR BREAKS.

1 IF AT ANY POINT YOU NEED A BREAK, JUST LET US KNOW
2 AND WE WILL TRY TO WORK THAT IN AT THE APPROPRIATE
3 POINT.

4 MISS LEAHY WILL BE CONDUCTING THE
5 DEPOSITION FOR THE DAY.

6 I WILL TURN OVER TO YOU.

7 MISS LEAHY: THANKS.

8 QUESTIONS BY MISS LEAHY
9 BY MISS LEAHY:

10 Q. GOOD MORNING, MISS PEARSON.

11 A. GOOD MORNING.

12 Q. I AM GOING TO BE ASKING YOU SOME
13 QUESTIONS ABOUT THE DECLARATION THAT WAS SUBMITTED
14 IN YOUR NAME IN THE CHAPTER 15 PROCEEDINGS IN
15 RELATION TO ASCENTRA HOLDINGS. WE ARE GOING TO
16 HAND YOU A COPY OF YOUR DECLARATION, WHICH IS
17 EXHIBIT A IN THESE PROCEEDINGS.

18 (EXHIBIT 1 MARKED FOR IDENTIFICATION)

19 BY MISS LEAHY:

20 Q. DID YOU WRITE THE DECLARATION
21 YOURSELF?

22 A. I DID NOT WRITE THE FIRST DRAFT
23 MYSELF.

24 Q. WHO WROTE THE FIRST DRAFT?

25 A. GRAEME HALKERSTON AT WILBERFORCE

1 CHAMBERS, IN LONDON.

2 Q. I SEE. DID YOU RESEARCH ANY PART
3 OF THE LAW THAT WAS SET OUT IN THE FIRST DRAFT?

4 A. YES, I CHECKED THE FIRST DRAFT
5 EXTREMELY THOROUGHLY. I CHECKED ALL OF THE
6 AUTHORITIES THAT WERE REFERRED TO. I DID SOME
7 ADDITIONAL RESEARCH OF MY OWN BEFORE THE
8 DECLARATION WAS FINALISED.

9 Q. WHY DID YOU NOT MAKE REFERENCE TO
10 THE FACT THAT YOU WERE ASSISTED IN THE PREPARATION
11 OF THE DECLARATION IN THE BODY OF THE DECLARATION?

12 MR. MORRIS: OBJECTION TO THE FORM
13 OF THE QUESTION.

14 A. WELL, IT IS MY DECLARATION. I AM
15 HAPPY WITH CONTENTS. I HAD SATISFIED MYSELF OF
16 THE CONTENTS OF IT AND I WAS HAPPY TO SUBMIT IT IN
17 MY OWN NAME GO.

18 BY MISS LEAHY:

19 Q. DO YOU WANT TO MAKE ANY CHANGES TO
20 THE DECLARATION BEFORE WE PROCEED TODAY?

21 A. NO.

22 Q. ARE THE OPINIONS STATED IN THE
23 DECLARATION ALL TRUE TO THE BEST OF YOUR KNOWLEDGE
24 AND BELIEF?

25 A. YES.

1 Q. IN THE DECLARATION, YOU IDENTIFIED
2 THREE TYPES OF CAYMAN LIQUIDATION: VOLUNTARY,
3 COMPULSORY AND COURT SUPERVISED LIQUIDATION,
4 RIGHT?

5 A. YES.

6 Q. I THINK WE CAN AGREE THAT THE
7 PURPOSE OF ALL THREE TYPES OF PROCEEDINGS IS TO
8 FINALLY WIND UP THE DEBTOR'S AFFAIRS AND BRING THE
9 EXISTENCE OF THE DEBTOR TO AN END?

10 MR. MORRIS: OBJECTION TO THE FORM
11 OF THE QUESTION.

12 A. YES.

13 BY MISS LEAHY:

14 Q. ALL THREE TYPES OF PROCEEDING ARE
15 TERMINAL PROCESSES, ARE THEY NOT?

16 A. YES.

17 Q. NOW, THE ESSENTIAL DIFFERENCES
18 BETWEEN A VOLUNTARY LIQUIDATION AND THE OTHER TWO
19 TYPES OF LIQUIDATION YOU HAVE IDENTIFIED ARE --
20 I AM GOING TO SUMMARISE THEM AND TELL ME WHETHER
21 YOU AGREE -- FIRST OF ALL, VOLUNTARY LIQUIDATIONS
22 ARE ALWAYS SOLVENT LIQUIDATIONS, WHEREAS THE OTHER
23 TWO TYPES OF LIQUIDATIONS MAY BE SOLVENT OR
24 INSOLVENT LIQUIDATIONS; IS THAT CORRECT?

25 A. YES.

1 Q. BOTH COMPULSORY AND COURT
2 SUPERVISED LIQUIDATIONS ARE INITIATED BY A COURT
3 ORDER AND PROCEED UNDER THE SUPERVISION OF THE
4 COURT, WHEREAS VOLUNTARY LIQUIDATIONS ARE USUALLY
5 INITIATED BY THE COMPANY ITSELF; IS THAT RIGHT?

6 A. YES.

7 Q. LIQUIDATORS IN COMPULSORY AND COURT
8 SUPERVISED LIQUIDATIONS ARE APPOINTED BY THE
9 COURT, WHEREAS VOLUNTARY LIQUIDATORS ARE APPOINTED
10 BY THE COMPANY. THAT IS RIGHT, IS IT NOT?

11 A. YES.

12 Q. LIQUIDATORS IN COMPULSORY AND COURT
13 SUPERVISED LIQUIDATIONS ARE OFFICERS OF THE COURT
14 BUT VOLUNTARY LIQUIDATORS ARE NOT OFFICERS OF THE
15 COURT. THAT IS RIGHT AS WELL, IS IT NOT?

16 A. VOLUNTARY LIQUIDATORS CAN BE
17 OFFICERS OF THE COURT BUT THEY DO NOT HAVE TO BE.

18 Q. BUT UNDER THE STATUTE THEY ARE NOT
19 OFFICERS OF THE COURT, ARE THEY?

20 A. THAT IS CORRECT, BUT CAYMAN
21 INSOLVENCY PRACTITIONERS, WHO ARE OFFICERS OF THE
22 COURT, OFTEN TAKE APPOINTMENTS AS VOLUNTARY
23 LIQUIDATOR AS WELL.

24 Q. IS THERE NOT A DIFFERENCE BETWEEN
25 SOMEBODY WHO IS QUALIFIED TO BE AN OFFICIAL

1 LIQUIDATOR, WHO TAKES AN APPOINTMENT AS A
2 VOLUNTARY LIQUIDATOR, AND SOMEBODY WHO IS
3 QUALIFIED TO TAKE AN APPOINTMENT AS AN OFFICIAL
4 LIQUIDATOR AND DOES? IN THE FORMER CASE, THE
5 PERSON IS QUALIFIED BUT NOT AN OFFICER OF THE
6 COURT BUT IN THE LATTER CASE HE IS QUALIFIED AND
7 AN OFFICER OF THE COURT. IS THAT NOT THE CASE?

8 A. YES, YES.

9 Q. THE PROCEDURE FOR INITIATING A
10 COMPULSORY LIQUIDATION DIFFERS OBVIOUSLY FROM THE
11 PROCEDURE FOR INITIATING A COURT SUPERVISED
12 LIQUIDATION, AND WE WILL DEAL WITH THAT IN DUE
13 COURSE. BUT OTHER THAN THAT, AS SOON AS A
14 SUPERVISION ORDER IS MADE, THE SAME RULES AND
15 PROCEDURES APPLY TO THE CONDUCT OF THE LIQUIDATION
16 AS APPLIED TO THE CONDUCT OF A COMPULSORY
17 LIQUIDATION, DO THEY NOT?

18 A. YES.

19 Q. SO THAT IS WHY WE DO NOT TALK
20 ABOUT -- IN PRACTICE IN THE CAYMAN ISLANDS, WE DO
21 NOT TALK ABOUT SUPERVISED AND COMPULSORY
22 LIQUIDATIONS GENERALLY, WE JUST TALK ABOUT
23 OFFICIAL LIQUIDATIONS. THAT IS RIGHT, IS IT NOT?

24 A. YES.

25 (EXHIBIT 1 MARKED FOR IDENTIFICATION)

1 BY MISS LEAHY:

2 Q. IN YOUR DECLARATION, AND PLEASE
3 TURN IT UP IF WOULD LIKE TO, AT PARAGRAPH 44, PAGE
4 12 ----

5 MR. MORRIS: DO YOU HAVE A COPY FOR
6 ME?

7 BY MISS LEAHY:

8 Q. IT IS PAGE 12. YOU SEE THE HEADING
9 IS "DIFFERENCES BETWEEN INSOLVENT COMPULSORY
10 LIQUIDATION AND SOLVENT COURT-SUPERVISED
11 LIQUIDATION"? THEN IN PARAGRAPH 44 YOU SAY:
12 "THERE ARE VERY SIGNIFICANT DIFFERENCES BETWEEN
13 THE CONDUCT OF THE SUPERVISED WINDING UP OF A
14 SOLVENT COMPANY AND THE CONDUCT OF A COMPULSORY
15 LIQUIDATION OF AN INSOLVENT COMPANY." I JUST WANT
16 TO UNPACK THAT A LITTLE BIT, BECAUSE I DO NOT
17 THINK YOU ARE TRYING TO SAY THAT THERE IS ANY
18 DIFFERENCE BETWEEN A SUPERVISED WINDING UP OF A
19 SOLVENT LIQUIDATION AND A COMPULSORY LIQUIDATION
20 OF A SOLVENT COMPANY, ARE YOU?

21 A. NO, NO.

22 Q. THEY WOULD BE MATERIALLY THE SAME,
23 WOULD THEY NOT?

24 A. YES. ONCE IT IS IN LIQUIDATION,
25 THE DIFFERENCE IS WHETHER IT IS SOLVENT OR

1 INSOLVENT. AS YOU HAVE ALREADY SAID, THE ROUTES
2 BY WHICH IT GETS INTO LIQUIDATION IS DIFFERENT
3 DEPENDING ON WHETHER IT IS A COMPULSORY
4 LIQUIDATION OR A VOLUNTARY THAT COMES UNDER COURT
5 SUPERVISION.

6 Q. SO THE POINT YOU WERE SEEKING TO
7 MAKE THERE IS SIMPLY THAT ONCE THE COMPANY IS IN
8 INSOLVENT LIQUIDATION, THERE ARE DIFFERENCES
9 BETWEEN -- SORRY, ONCE THE COMPANY IS IN OFFICIAL
10 LIQUIDATION, THERE ARE DIFFERENCES BETWEEN THE
11 PROCEDURE THAT APPLIES TO THE COMPANY IF IT IS
12 SOLVENT AND THE PROCEDURES WHICH APPLY IF IT IS
13 INSOLVENT?

14 A. YES.

15 Q. BUT IT DOES NOT MATTER WHETHER IT
16 ORIGINATED AS A COURT SUPERVISED LIQUIDATION OR A
17 COMPULSORY LIQUIDATION?

18 MR. MORRIS: OBJECTION TO THE FORM
19 OF THE QUESTION.

20 A. YES.

21 BY MISS LEAHY:

22 Q. I WANT TO, FIRST, LOOK AT WHAT
23 SOLVENT AND INSOLVENT OFFICIAL LIQUIDATIONS HAVE
24 IN COMMON.

25 A. OKAY.

1 Q. THEN WE WILL EXPLORE AFTER THAT
2 WHAT YOU SAY THE DIFFERENCES ARE BETWEEN THE TWO.
3 WHETHER THE OFFICIAL LIQUIDATION IS SOLVENT OR
4 INSOLVENT, THEY BOTH WILL HAVE BEEN INITIATED BY A
5 COURT ORDER, WILL THEY NOT?

6 A. YES.

7 Q. WHETHER THE OFFICIAL LIQUIDATION IS
8 SOLVENT OR INSOLVENT, IT WILL BE SUPERVISED BY THE
9 COURT, WILL IT NOT?

10 A. YES.

11 Q. AND WHETHER THE LIQUIDATION IS
12 SOLVENT OR INSOLVENT, THE LIQUIDATORS WILL BE
13 APPOINTED BY THE COURT?

14 A. YES.

15 Q. AND WHETHER THE LIQUIDATION IS
16 SOLVENT OR INSOLVENT, THE OFFICIAL LIQUIDATOR MUST
17 GIVE NOTICE OF HIS APPOINTMENTS TO ALL CREDITORS
18 AND CONTRIBUTORIES?

19 A. YES.

20 Q. AND WHETHER THE LIQUIDATION IS
21 SOLVENT OR INSOLVENT, THE PRIMARY FUNCTION OF THE
22 LIQUIDATOR IS THE SAME, WHICH IS TO COLLECT AND
23 REALISE AND DISTRIBUTE THE DEBTOR'S ASSETS TO HIS
24 CREDITORS AND IF THERE IS A SURPLUS TO THE PERSONS
25 ENTITLED?

1 MR. MORRIS: OBJECTION TO THE FORM
2 OF THE QUESTION.

3 A. YES.

4 BY MISS LEAHY:

5 Q. AND WHETHER THE LIQUIDATION IS
6 SOLVENT OR INSOLVENT DURING THE PENDENCY OF THE
7 LIQUIDATION NO CREDITOR OR OTHER CLAIMANT CAN
8 BRING ANY PROCEEDING OR CONTINUE ANY PROCEEDING
9 AGAINST THE DEBTOR COMPANY WITHOUT THE LEAVE OF
10 THE CAYMAN COURT. THAT IS RIGHT, IS IT NOT?

11 A. YES.

12 Q. AND THAT IS PURSUANT TO SECTION 97
13 OF THE COMPANIES ACT, IS IT NOT?

14 A. WELL, I DO NOT HAVE THE COMPANIES
15 ACT ----

16 Q. WE HAVE A COPY THAT WE CAN HAND UP
17 AS EXHIBIT B? WOULD YOU LIKE TO CHECK?

18 MR. MORRIS: TWO.

19 MISS LEAHY: TWO. TWO COPIES.

20 ([EXHIBIT 2](#) MARKED FOR IDENTIFICATION)

21 MR. MORRIS: WHICH SECTION ARE YOU
22 ON?

23 MISS HEALY: IT IS SECTION 97.

24 MR. MORRIS: THANK YOU.

25 MISS HEALY: PAGE 78.

1 A. YES.

2 BY MISS HEALY: IT IS SECTION 97?

3 A. YES, YES, IT IS.

4 MR. MORRIS: I APOLOGISE FOR
5 INTERRUPTING, BUT ARE WE MARKING THESE DOCUMENTS
6 AS EXHIBITS?

7 MR. MCDONALD: THIS IS EXHIBIT
8 NUMBER 2.

9 MISS HEALY: NUMBER 2, SORRY.

10 A SPEAKER: I BELIEVE WE MARKED THE
11 FIRST ONE AS A.

12 MR. MORRIS: WE DID IT AS 1,
13 ACTUALLY.

14 A SPEAKER 2: OKAY.

15 MR. MCDONALD: SORRY FOR THE
16 CONFUSION.

17 MR. MORRIS: SO, TO BE CLEAR ----

18 MR. MCDONALD: TO BE CLEAR, THE
19 DECLARATION IS EXHIBIT 1.

20 MR. MORRIS: OKAY.

21 MR. MCDONALD: THE COMPANIES ACT IS
22 EXHIBIT 2.

23 MR. MORRIS: THANK YOU.

24 BY MISS LEAHY:

25 Q. MISS PEARSON, I DO NOT EXPECT YOU

1 FOR A MOMENT TO HAVE MEMORIZED THE ENTIRE
2 COMPANIES ACT AND ALL THE SECTIONS OR THE RULES,
3 SO IF YOU AT ANY POINT WANT TO JUST CHECK A
4 SECTION, PLEASE FEEL FREE TO SAY SO AND WE CAN
5 TURN IT UP.

6 A. YES. THANK YOU.

7 Q. IT IS RIGHT ALSO THAT SECTION 97
8 HAS EXTRATERRITORIAL EFFECT, DOES IT NOT?

9 A. YES.

10 Q. BECAUSE OF SECTION 97, WHETHER THE
11 COMPANY IS INSOLVENT OR INSOLVENT LIQUIDATION, IT
12 IS SIMPLY NOT POSSIBLE FOR THE CREDITORS TO TAKE
13 ANY PROCEEDINGS AGAINST THE COMPANY WITHOUT THE
14 LEAVE OF THE COURT?

15 A. YES.

16 Q. NOW, IT IS ALSO RIGHT, IS IT NOT,
17 THAT ORDER 8 OF THE COMPANIES WINDING UP RULES
18 APPLIES TO EVERY LIQUIDATION?

19 A. DO YOU HAVE A COPY OF ORDER 8?

20 Q. SURE, AND THIS WILL BE EXHIBIT 3.
21 (EXHIBIT 3 MARKED FOR IDENTIFICATION)

22 A. THANK YOU.

23 Q. IF YOU JUST WANT TO REMIND YOURSELF
24 OF ORDER 8, RULE 1, AND THEN I CAN ASK YOU SOME
25 QUESTIONS?

1 A. OKAY.

2 Q. SO, THE FIRST QUESTION IS IN EVERY
3 LIQUIDATION, WHETHER SOLVENT OR INSOLVENT, THE
4 LIQUIDATOR MUST, FIRST, MAKE A SUMMARY
5 DETERMINATION AS TO WHETHER THE COMPANY IS SOLVENT
6 INSOLVENT OR OF DOUBTFUL INSOLVENCY? THAT IS
7 RIGHT?

8 A. YES.

9 Q. AND HE ALSO MUST KEEP THAT DECISION
10 UNDER REVIEW, MUST HE NOT?

11 A. YES.

12 Q. SO, FOR EXAMPLE, HE MIGHT INITIALLY
13 SAY, WELL, THE COMPANY IS SOLVENT, BUT THEN CHANGE
14 HIS MIND AND SAY, WELL, ACTUALLY, I THINK NOW IT
15 IS INSOLVENT. IN THOSE CIRCUMSTANCES, HE IS DUTY
16 BOUND TO MAKE A REVISED DETERMINATION, IS HE NOT?

17 A. YES.

18 Q. AND HE COULD IN PRINCIPLE CHANGE
19 HIS MIND ON MULTIPLE OCCASIONS, COULD HE NOT?

20 A. YES.

21 Q. THEN WHETHER THE LIQUIDATION IS
22 SOLVENT OR INSOLVENT, THE OFFICIAL LIQUIDATOR HAS
23 THE SAME POWERS, AND THEY ARE THE POWERS SET OUT
24 IN SCHEDULE 3 TO THE ACT. THAT IS RIGHT, IS IT
25 NOT? WOULD YOU LIKE TO TURN UP SCHEDULE 3?

1 A. YES, I WILL.

2 Q. YOU WILL FIND IT ON PAGE 199.

3 A. YES. YES, THAT IS CORRECT.

4 Q. SO THE POWERS IN PART 1 ARE POWERS
5 THAT ARE EXERCISABLE WITH SANCTION AND THE POWERS
6 IN PART 2 ARE POWERS THAT ARE EXERCISABLE WITHOUT
7 SANCTION, CORRECT?

8 A. YES.

9 Q. THEN IF WE LOOK AT PART 1, WE SEE A
10 WHOLE LIST OF POWERS FOR WHICH THE LIQUIDATOR HAS
11 TO APPLY TO COURT FOR SANCTION TO EXERCISE. IT IS
12 RIGHT, IS IT NOT, THAT RULE 4 PROVIDES THAT HE HAS
13 POWER TO PAY ANY CLASS OF CREDITORS IN FULL?

14 A. YES.

15 Q. AND THAT IS THE CASE WHETHER THE
16 COMPANY IS INSOLVENT OR SOLVENT?

17 A. YES.

18 Q. AND WE WILL SEE IN RULE 5 HE ALSO
19 HAS POWER TO MAKE ANY COMPROMISE OR ARRANGEMENT
20 WITH CREDITORS OR PERSONS CLAIMING TO BE
21 CREDITORS.

22 A. YES.

23 Q. THAT IS RIGHT, IS IT NOT, IN BOTH
24 SOLVENT AND INSOLVENT LIQUIDATIONS?

25 A. YES, WITH THE SANCTION OF THE

1 COURT, YES.

2 Q. YES. THEN IN RULE 6, HE ALSO HAS,
3 "POWER TO COMPROMISE ON SUCH TERMS AS MAY BE
4 AGREED ALL DEBTS AND LIABILITIES CAPABLE OF
5 RESULTING IN DEBTS, AND ALL CLAIMS (PRESENT OR
6 FUTURE, CERTAIN OR CONTINGENT, ASCERTAINED OR
7 STANDING ONLY IN DAMAGES) ..." I AM NOT GOING TO
8 READ THE WHOLE THING, BUT WE SEE THAT THE POWER IN
9 6 AGAIN IS A POWER EXERCISABLE WITH THE SANCTION
10 OF THE COURT IN SOLVENT AND INSOLVENT
11 LIQUIDATIONS?

12 A. YES.

13 Q. NOW, IN THE OFFICIAL LIQUIDATION,
14 WHETHER IT IS SOLVENT OR INSOLVENT, CREDITORS CAN
15 APPLY TO COURT TO SEEK THE REMOVAL OF THE OFFICIAL
16 LIQUIDATOR, CAN THEY NOT?

17 A. I WOULD NEED TO CHECK THE SECTION.

18 Q. SECTION 107.

19 A. SO YES, BUT IF THE COMPANY WERE
20 SOLVENT, AND THAT APPLICATION WERE MADE BY A
21 CREDITOR, THEN THE COURT WOULD GIVE THE CREDITOR'S
22 VIEWS VERY LITTLE WEIGHT, IF ANY.

23 Q. OKAY. SO LET US PUT OURSELVES IN
24 THAT SOLVENT SITUATION.

25 A. YES.

1 Q. YOU ACCEPT THAT THE CREDITOR HAS
2 STANDING TO APPLY TO COURT?

3 A. UNDER THAT SECTION.

4 Q. UNDER THAT SECTION?

5 A. YES.

6 Q. TO SEEK THE REMOVAL?

7 A. YES.

8 Q. AND LET US TEST IT THIS WAY.

9 IMAGINE THAT THE LIQUIDATOR IS ACTING IN SUCH A
10 MANNER THAT HE IS PUTTING THE INTERESTS OF
11 CREDITORS AT RISK, ARE YOU SAYING IN THAT
12 SITUATION THAT THE COURT WOULD GIVE NO WEIGHT TO
13 THE VIEWS OF CREDITORS?

14 MR. MORRIS: OBJECTION TO THE FORM
15 OF THE QUESTION.

16 A. SO, WHAT DO YOU MEAN BY HE IS
17 ACTING IN SUCH A MANNER THAT HE IS PUTTING THE
18 VIEWS OF THE INTERESTS OF THE CREDITORS AT RISK,
19 BECAUSE IF IT IS A SOLVENT LIQUIDATION, HE IS
20 MEANT TO BE PAYING THE CREDITORS IN THE ORDINARY
21 COURSE?

22 BY MISS LEAHY:

23 Q. LET US TAKE AN EXAMPLE OF A COMPANY
24 THAT IS VERY CLEARLY SOLVENT, OKAY, BUT THE ASSETS
25 HAVE NOT BEEN REALISED AS YET, SO THE LIQUIDATOR

1 IS NOT ABLE TO PAY THE CREDITOR'S CLAIMS AS THEY
2 FALL DUE?

3 A. MMM-HMM.

4 Q. ONE OF THE ASSETS THAT IS AVAILABLE
5 TO BE REALISED IS A PROPERTY, WHICH HE IS GOING TO
6 SELL, AND ANOTHER ASSET THAT IS AVAILABLE
7 POTENTIALLY TO BE REALISED IS A CLAIM, A CAUSE OF
8 ACTION. NOW, IF HE BRINGS THE CAUSE OF ACTION AND
9 LOSES, THERE IS A RISK THAT THE CREDITORS WILL NOT
10 BE PAID THEIR STATUTORY INTEREST TO WHICH THEY ARE
11 ENTITLED, BUT IF HE DOES NOT BRING THE CLAIM, THEN
12 THERE IS GOING TO BE LESS MONEY AVAILABLE FOR THE
13 SHAREHOLDERS. NOW, IN THAT SITUATION IF THE
14 LIQUIDATOR WAS SEEKING TO PURSUE THE LITIGATION,
15 DO YOU NOT THINK THAT THE COURT WOULD HEAR THE
16 CREDITORS AND GIVE THEIR VIEWS SOME WEIGHT?

17 MR. MORRIS: OBJECTION TO THE FORM
18 OF THE QUESTION.

19 A. THERE IS QUITE A LOT IN THAT
20 QUESTION THAT I WOULD WANT TO UNPACK AND SPEND
21 SOME TIME THINKING ABOUT IF I WAS CONFRONTED.

22 BY MISS LEAHY:

23 Q. OKAY. CAN YOU IMAGINE ANY
24 SITUATION IN WHICH CREDITORS OF A SOLVENT COMPANY
25 IN WHICH THEIR INTERESTS MIGHT BE AT RISK BY THE

1 ACTIONS OF A LIQUIDATOR?

2 A. I MEAN, IN AN EXAMPLE LIKE THE ONE
3 THAT YOU HAVE JUST GIVEN I WOULD QUERY WHETHER
4 THERE IS A SOLVENT COMPANY, BECAUSE IF THERE IS A
5 QUESTION AS TO WHETHER THE CREDITORS ARE GOING TO
6 BE PAID IN FULL, THEN THE LIQUIDATOR NEEDS TO BE
7 THINKING ABOUT CHANGING HIS SOLVENCY DETERMINATION
8 AND CHANGING IT TO DOUBTFUL SOLVENCY. YOU KNOW,
9 YOU DO HAVE THIS DOUBTFUL SOLVENCY CATEGORY TO
10 COVER QUESTIONS WHERE -- CASES WHERE YOU DO NOT
11 KNOW FOR SURE IF IT IS GOING TO BE SOLVENT OR NOT.
12 IN MY EXPERIENCE THAT CATEGORY IS USED QUITE A LOT
13 FOR THE VERY REASON THAT THE LIQUIDATOR DOES NOT
14 KNOW IF CREDITORS ARE GOING TO BE MADE WHOLE AT
15 THE END OF THE PROCESS, AND PROBABLY THEY ARE, BUT
16 IT IS SAFER TO GO WITH DOUBTFUL SOLVENCY THAN TO
17 CERTIFY THE COMPANY AS SOLVENT AND REMOVE
18 CREDITORS FROM THE PROCESS ENTIRELY.

19 Q. BUT WHAT IF HE WAS ESSENTIALLY
20 WANTING TO PURSUE LITIGATION THAT IF HE DID NOT
21 PURSUE -- STAND BACK. HE WANTS TO PURSUE THIS
22 LITIGATION. IF HE DOES NOT PURSUE IT, CREDITORS
23 WILL DEFINITELY BE PAID IN FULL WITH STATUTORY
24 INTEREST. IF HE DOES PURSUE IT, THERE IS A RISK
25 THAT THEY WILL NOT BE PAID IN FULL WITH STATUTORY

1 INTEREST. SO IN THAT SITUATION IS THE COMPANY
2 SOLVENT OR OF DOUBTFUL SOLVENCY?

3 MR. MORRIS: OBJECTION TO THE FORM
4 OF THE QUESTION.

5 BY MISS LEAHY:

6 Q. I SUGGEST TO YOU IT IS OBVIOUSLY
7 STILL SOLVENT?

8 MR. MORRIS: OBJECTION TO THE FORM
9 OF THE QUESTION.

10 A. I MEAN, THIS IS A VERY -- IT IS A
11 DIFFICULT QUESTION TO ANSWER HYPOTHETICALLY, AND
12 IT IS ONE THAT I WOULD WANT TO GIVE A LOT MORE
13 THOUGHT TO, BUT I THINK THERE IS DEFINITELY AN
14 ARGUMENT IN A CASE LIKE THAT, YOU KNOW, THAT A
15 COMPANY LIKE THAT IS OF DOUBTFUL SOLVENCY BECAUSE
16 THERE IS A QUESTION MARK OVER WHETHER THE
17 CREDITORS ARE GOING TO BE MADE WHOLE AT THE END OF
18 THE DAY, AND THAT IS THE WHOLE POINT OF THE
19 DETERMINATION.

20 BY MISS LEAHY:

21 Q. THE QUESTION MARK ONLY ARISES IF
22 THE LIQUIDATOR PURSUES LITIGATION?

23 A. YES.

24 Q. SO IN THAT CASE HOW CAN YOU SAY
25 THAT THE SOLVENCY IS DOUBTFUL? HE DOES NOT HAVE

1 TO PURSUE THE LITIGATION, DOES HE?

2 A. NO, NO, HE DOES NOT HAVE TO, BUT,
3 I MEAN, YOU KNOW, MY INITIAL RESPONSE IS THAT
4 THERE WOULD BE A QUESTION MARK OVER WHETHER THE
5 COMPANY IS GOING TO BE SOLVENT AND THEREFORE, YOU
6 KNOW, PERHAPS IT IS OF DOUBTFUL SOLVENCY RATHER
7 THAN SOLVENT. IF THE LIQUIDATOR IS GOING TO TAKE
8 A COURSE THAT CERTAINLY IF HE PURSUES THAT
9 LITIGATION AND THERE IS A RISK THAT HE IS GOING TO
10 LOSE AND THEREFORE THE CREDITORS ARE GOING TO
11 LOSE THEIR ENTITLEMENT TO INTEREST POSSIBLY IN
12 PART OF THEIR CLAIM, THEN THAT CERTAINLY BRINGS IT
13 INTO THE REALM OF DOUBTFUL SOLVENCY, RATHER THAN
14 SOLVENCY.

15 Q. IN WHICH SITUATION YOU WOULD SAY
16 THAT COURT WOULD GIVE WEIGHT TO THE VIEWS OF THE
17 CREDITORS?

18 A. IF IT IS OF DOUBTFUL SOLVENCY, YES,
19 ABSOLUTELY.

20 Q. I SEE. WHAT ABOUT A MORE EXTREME
21 EXAMPLE THAT WE HOPE WOULD NEVER ARISE, THAT WE
22 HAVE A NAUGHTY LIQUIDATOR WHO IS HELPING HIMSELF
23 TO THE FUNDS THAT HE IS REALISING. NOBODY KNOWS
24 PRECISELY HOW MUCH IS TAKEN, SO NOBODY KNOWS THE
25 EXACT AMOUNT, BUT IT IS VERY CLEAR THAT THERE IS

1 ENOUGH MONEY LEFT FOR THE CREDITORS TO BE PAID IN
2 FULL. IT IS JUST UNCLEAR WHETHER THE SHAREHOLDERS
3 WILL GET PAID AS MUCH AS THEY HOPED. IN THAT
4 SITUATION, IF A CREDITOR DECIDED TO APPLY TO COURT
5 TO REMOVE THE LIQUIDATOR, WOULD YOU SAY THAT THE
6 COURT WOULD NOT GIVE THE CREDITORS' VIEWS ANY
7 WEIGHT?

8 A. I MEAN, AGAIN YOU ARE ASKING ME
9 THESE SITUATIONS ON THE HOOF. GENERALLY, THESE
10 ARE THINGS THAT I WOULD GO AWAY AND THINK ABOUT
11 AND DO SOME RESEARCH. BUT, YOU KNOW, IT SEEMS TO
12 ME LIKE QUITE A FARFETCHED SCENARIO, THAT YOU
13 WOULD HAVE A SITUATION LIKE THAT AND IT WOULD BE
14 THE -- WHY WOULD A CREDITOR BE THE ONE BRINGING
15 THE APPLICATION IN THAT CASE? WHY WOULD IT NOT BE
16 A SHAREHOLDER, BECAUSE THEY ARE THE ONES THAT ARE
17 PREJUDICED, THEY ARE THE ONES THAT ARE GOING TO
18 LOSE OUT?

19 Q. BUT WE NEED TO LOOK AT THIS AS A
20 MATTER OF PRINCIPLE.

21 A. YES.

22 Q. THE QUESTION IS I WANT TO
23 UNDERSTAND IN WHAT CIRCUMSTANCES YOU SAY THE COURT
24 MIGHT GIVE SOME WEIGHT TO THE VIEWS OF CREDITORS
25 EVEN THOUGH THE COMPANY IS SOLVENT.

1 A. HMM.

2 Q. I THINK YOU ARE SUGGESTING THAT THE
3 COURT WOULD JUST ALWAYS IGNORE THE VIEWS OF
4 CREDITORS ----

5 MR. MORRIS: OBJECTION TO THE FORM
6 OF THE QUESTION.

7 BY MISS LEAHY:

8 Q. ---- ON AN APPLICATION FOR REMOVAL?

9 MR. MORRIS: IT MISSTATES THE
10 TESTIMONY.

11 A. FOR AN APPLICATION FOR REMOVAL OF A
12 LIQUIDATOR OF SOLVENT COMPANY, THE VIEWS OF
13 CREDITORS ARE GOING TO BE GIVEN VERY LITTLE
14 WEIGHT.

15 BY MISS LEAHY:

16 Q. REGARDLESS OF THE FACTS?

17 A. PRETTY MUCH, YES.

18 Q. I SEE. NOW TERMINATION. IT IS
19 RIGHT THAT ONCE THE LIQUIDATORS HAVE CARRIED OUT
20 THEIR DUTIES, AND THE AFFAIRS OF THE DEBTOR ARE
21 FULLY WOUND UP, THEY HAVE TO OBTAIN AN ORDER FROM
22 THE COURT THAT THE COMPANY BE DISSOLVED, DO THEY
23 NOT?

24 A. YES.

25 Q. THAT IS THE SAME WHETHER THE

1 COMPANY IS INSOLVENT OR SOLVENT?

2 A. YES.

3 Q. THERE IS NO PRESCRIBED TIME FRAME
4 IN WHICH THE LIQUIDATORS MUST ACTUALLY OBTAIN AN
5 ORDER FROM THE CAYMAN COURT THAT THE COMPANY BE
6 DISSOLVED, IS THERE?

7 A. NO.

8 Q. AND THE COURT ACTUALLY RETAINS A
9 DISCRETION AS TO WHETHER TO GRANT THE LIQUIDATOR'S
10 REQUEST OR NOT, DOES IT NOT?

11 A. CAN WE LOOK AT THE SECTION ON
12 DISSOLUTION?

13 Q. 152.

14 A. COULD YOU REPEAT YOUR QUESTION?

15 Q. DOES THE COURT RETAIN A DISCRETION
16 WHETHER OR NOT TO GRANT THE DISSOLUTION ORDER?

17 A. NOT ACCORDING TO 152(1). THAT SAYS
18 THE COURT SHALL MAKE AN ORDER THAT THE COMPANY BE
19 DISSOLVED. OBVIOUSLY THERE IS A QUESTION ABOUT
20 WHETHER THE AFFAIRS OF THE COMPANY HAVE BEEN
21 COMPLETELY WOUND UP, AND THE LIQUIDATOR WILL NEED
22 TO SATISFY THE COURT THAT THAT IS THE CASE. IF
23 THE COURT IS NOT SATISFIED, THEN IT WILL NOT MAKE
24 THE ORDER, BUT ----

25 Q. I THINK WE ARE AGREED ON THAT.

1 A. YES. MY READING, YOU KNOW --
2 AGAIN, OFF THE TOP OF MY HEAD, MY READING OF THAT
3 SECTION WOULD BE THAT IF THE COURT IS SATISFIED
4 THAT THE AFFAIRS OF THE COMPANY HAVE BEEN
5 COMPLETELY WOUND UP, THEN IT SHALL MAKE THE ORDER.
6 THAT LANGUAGE IS MANDATORY AND IT DOES NOT HAVE A
7 DISCRETION.

8 Q. GOOD. JUST TO RECAP ON WHAT
9 I THINK IS SOME COMMON GROUND THAT WE HAVE
10 ESTABLISHED BEFORE WE GO ON TO THE SLIGHTLY MORE
11 CONTENTIOUS AREAS, FIRST OF ALL, A COMPANY CAN
12 ONLY ENTER OFFICIAL LIQUIDATION IF A COURT MAKES
13 AN ORDER TO THAT EFFECT?

14 A. YES.

15 Q. ONCE THE COMPANY ENTERS INTO
16 OFFICIAL LIQUIDATION, THE PROCEEDING IS SUPERVISED
17 BY THE CAYMAN COURT?

18 A. YES.

19 Q. THE OFFICIAL LIQUIDATOR IS
20 APPOINTED BY THE CAYMAN COURT AND MUST GIVE NOTICE
21 OF THE LIQUIDATION TO ALL CREDITORS?

22 A. YES.

23 Q. THE OFFICIAL LIQUIDATOR'S PRIMARY
24 FUNCTION TO COLLECT IN AND DISTRIBUTE THE ASSETS
25 OF THE COMPANY, FIRST TO THE CREDITORS AND THEN TO

1 THE SHAREHOLDERS?

2 A. YES.

3 Q. BECAUSE OF THE SECTION 97 STAY, IT
4 IS NOT POSSIBLE FOR PEOPLE MAKING CLAIMS AGAINST
5 THE DEBTOR TO COMMENCE OR CONTINUE LITIGATION
6 AGAINST HIM WITHOUT THE LEAVE OF THE COURT?

7 A. YES.

8 Q. OR IT, I SHOULD SAY.

9 A. YES.

10 Q. RATHER THAN HIM.

11 A. YES.

12 Q. THE OFFICIAL LIQUIDATOR HAS TO MAKE
13 A DETERMINATION ON A SUMMARY BASIS AS TO WHETHER
14 THE COMPANY IS SOLVENT OR INSOLVENT OR OF DOUBTFUL
15 SOLVENCY AND CONTINUOUSLY KEEP THAT DETERMINATION
16 UNDER REVIEW?

17 A. YES.

18 Q. THE OFFICIAL LIQUIDATOR HAS THE
19 POWERS SET OUT IN SCHEDULE 3 OF THE ACT, INCLUDING
20 THE POWER TO COMPROMISE CREDITORS' CLAIMS?

21 A. YES.

22 Q. THE OFFICIAL LIQUIDATOR IS REQUIRED
23 TO APPLY TO COURT FOR SANCTION TO EXERCISE ANY OF
24 THE POWERS IN PART 1 OF SCHEDULE 3? THAT IS
25 RIGHT, IS IT NOT?

1 A. YES.

2 Q. CREDITORS HAVE STANDING TO APPLY TO
3 COURT TO REMOVE THE OFFICIAL LIQUIDATOR?

4 A. YES.

5 Q. AND AN OFFICIAL LIQUIDATION MAY NOT
6 BE TERMINATED EXCEPT BY ORDER OF THE CAYMAN COURT?

7 A. YES.

8 Q. NOW I WANT TO START TO ADDRESS WHAT
9 YOU SAY ARE SIGNIFICANT DIFFERENCES BETWEEN AN
10 INSOLVENT AND A SOLVENT OFFICIAL LIQUIDATION. I AM
11 JUST GOING TO TAKE SOME WATER.

12 A. OKAY.

13 Q. FIRST OF ALL, DEALING WITH CREDITOR
14 CLAIMS ----

15 A. YES.

16 Q. ---- WE HAVE SEEN WHEN WE LOOKED AT
17 SCHEDULE 3 THAT THE LIQUIDATOR HAS POWER TO AGREE
18 AND SETTLE AND COMPROMISE CREDITORS' CLAIMS?

19 A. YES, WITH SANCTION, YES.

20 Q. WITH SANCTION?

21 A. YES.

22 Q. AND THAT IS THE SAME IN BOTH
23 SOLVENT AND INSOLVENT LIQUIDATIONS?

24 A. YES.

25 Q. IN AN INSOLVENT LIQUIDATION, A

1 CREDITOR ASSERTING A CLAIM AGAINST THE ESTATE MUST
2 FILE A PROOF OF DEBT. THAT IS RIGHT, IS IT NOT?

3 A. YES.

4 Q. AND IF HE DOES NOT FILE A PROOF OF
5 DEBT HE IS NOT GOING TO BE ENTITLED TO ANY
6 DIVIDEND, IS HE?

7 A. NO.

8 Q. IN A SOLVENT LIQUIDATION, THE
9 OFFICIAL LIQUIDATOR CAN REQUEST A CREDITOR TO
10 SUBMIT A PROOF OF DEBT IN CERTAIN CIRCUMSTANCES?

11 A. YES.

12 Q. AND IF THE CREDITOR DOES NOT SUBMIT
13 A PROOF OF DEBT THE LIQUIDATOR CAN PUT HIM ON
14 NOTICE THAT HE IS REJECTING THE DEBT?

15 A. YES. CAN WE HAVE A LOOK AT ORDER
16 16, RULE 3?

17 Q. OF COURSE. PAGE 93.

18 A. YES.

19 Q. IS THERE ANY PARTICULAR
20 PROVISION ----

21 A. I WAS LOOKING AT ORDER 16 OF THE
22 COMPANIES WINDING UP RULES, WHICH IS PAGE 79.

23 I AM NOT SURE ----

24 Q. FOR SOME REASON IT IS 93 OF MINE.

25 A. OKAY. BUT WE HAVE ORDER 16?

1 Q. ORDER 16 IS OVER THE SAME PAGE, BUT
2 JUST NOT LITERALLY.

3 A. THAT IS FINE. I JUST WANTED TO
4 DOUBLE-CHECK ORDER 16, RULE 1(3).

5 Q. 1(3), WHICH IS, "THE OFFICIAL
6 LIQUIDATOR OF A SOLVENT COMPANY WHICH IS BEING
7 WOUND UP BY THE COURT MAY REQUIRE A CREDITOR TO
8 SUBMIT A PROOF OF DEBT . . ."

9 A. YES, YES.

10 Q. YES. AND THE CIRCUMSTANCES ARE IF
11 THERE IS A DOUBT OR DISPUTE ABOUT THE EXISTENCE OF
12 THE DEBT OR THE AMOUNT OWING TO THE CREDITOR?

13 A. YES.

14 Q. JUST IN THAT SITUATION?

15 A. YES.

16 Q. THERE IS NO DISPUTE HE DOES NOT
17 HAVE TO REQUIRE THE CREDITOR ----

18 A. NO.

19 Q. ---- TO SUBMIT A PROOF OF DEBT?

20 A. NO.

21 Q. AND THAT WOULD BE POINTLESS, WOULD
22 IT NOT, IF THERE IS NO DISPUTE ABOUT THE DEBT FOR
23 THE LIQUIDATOR TO REQUIRE THE CREDITOR TO FILE A
24 PROOF OF DEBT?

25 MR. MORRIS: OBJECTION TO THE FORM

1 OF THE QUESTION.

2 A. YES, IT WOULD, BECAUSE IF THERE IS
3 NO DISPUTE ABOUT THE EXISTENCE OF THE DEBT OR THE
4 AMOUNT OWING, THEN THE LIQUIDATOR IS SUPPOSED TO
5 PAY THOSE DEBTS IN THE ORDINARY COURSE.

6 BY MISS LEAHY:

7 Q. AND IF THERE IS A DISPUTE AND THE
8 LIQUIDATOR ASKED THE CREDITOR IN THE SOLVENT
9 LIQUIDATION TO SUBMIT A PROOF OF DEBT, IT IS
10 RIGHT, IS IT NOT, THAT THE PROCEDURE THAT APPLIES
11 TO THE ADJUDICATION OF THAT PROOF OF DEBT IS THE
12 SAME AS THE PROCEDURE THAT APPLIES IN THE CONTEXT
13 OF AN INSOLVENT LIQUIDATION?

14 A. IT IS, EXCEPT THAT THE LIQUIDATOR
15 CANNOT FORCE THE CREDITOR TO SUBMIT THE PROOF OF
16 DEBT. SO IT HAS TO BE CONSENTED TO ON BOTH SIDES,
17 BASICALLY.

18 Q. I MEAN, OBVIOUSLY IN THE INSOLVENT
19 SITUATION, THE LIQUIDATOR CANNOT FORCE THE
20 CREDITOR TO SUBMIT A DEBT?

21 A. YES, A PROOF OF DEBT, YES.

22 Q. A PROOF OF DEBT. HE CANNOT FORCE
23 THE CREDITOR TO DO THAT, CAN HE?

24 A. NO.

25 Q. BUT IF THE CREDITOR DOES NOT DO IT,

1 AS WE HAVE ALREADY ESTABLISHED, HE LOSES HIS
2 ENTITLEMENT TO A DIVIDEND?

3 A. YES.

4 Q. THAT IS RIGHT?

5 A. YES.

6 Q. IF WE GO THEN TO THE SOLVENT
7 SITUATION, AND THE CREDITOR REFUSES TO FILE A
8 PROOF OF DEBT AND THE LIQUIDATOR SAYS, WELL, I AM
9 GOING TO REJECT YOUR DEBT THEN, YOU KNOW, BECAUSE,
10 AS YOU KNOW, IT IS DISPUTED, YOU HAVE NOT FILED A
11 PROOF, I CANNOT ADJUDICATE ON IT, THE CREDITOR IN
12 THAT SITUATION HAS A CHOICE, DOES HE NOT, HE CAN
13 EITHER APPLY TO COURT UNDER SECTION 97 FOR LEAVE
14 TO BRING A CLAIM OR HE CAN SIMPLY ABANDON HIS
15 CLAIM? THOSE ARE HIS CHOICES, ARE THEY NOT?

16 A. I WOULD SAY HE HAS THREE CHOICES.

17 HE CAN EITHER FILL IN THE PROOF OF DEBT AND HAVE
18 HIS CLAIM ADJUDICATED ----

19 Q. YES, OF COURSE.

20 A. ---- THROUGH THE PROOF OF DEBT
21 PROCESS OR HE CAN APPLY UNDER SECTION 97 FOR LEAVE
22 TO LIFT THE STAY AND HAVE HIS CLAIM DETERMINED BY
23 LITIGATION OUTSIDE THE PROOF OF DEBT PROCESS OR HE
24 CAN ABANDON HIS CLAIM.

25 Q. I COMPLETELY AGREE WITH THAT. MY

1 QUESTION WAS PUT ON THE ASSUMPTION THAT HE HAD
2 DECIDED NOT TO SUBMIT A PROOF OF DEBT.

3 A. YES.

4 Q. NOW, JUST DEALING VERY BRIEFLY WITH
5 SECTION 97, IF THE CREDITOR MAKES AN APPLICATION
6 UNDER SECTION 97, HE HAS TO PERSUADE THE COURT,
7 FIRST OF ALL, THAT HIS CLAIM IS ARGUABLE AND,
8 SECOND OF ALL, THAT IT IS FAIR IN ALL THE
9 CIRCUMSTANCES FOR THE CLAIM TO BE LITIGATED
10 OUTSIDE THE LIQUIDATION, AS YOU PUT IT, RATHER
11 THAN THROUGH THE PROOF OF DEBT PROCESS IN THE
12 LIQUIDATION. THAT IS RIGHT, IS IT NOT?

13 A. I MEAN, THAT IS QUITE A BIG
14 QUESTION. THAT IS SOMETHING THAT AGAIN I WOULD
15 WANT TO GIVE SOME MORE CONSIDERATION TO, BUT THAT
16 SOUNDS ----

17 Q. WHAT IS THE TEST UNDER SECTION 97?

18 A. ---- RIGHT, YES. IT IS WHETHER IT
19 IS ----

20 MR. MORRIS: YOU HAVE INTERRUPTED
21 HER A FEW TIMES. I KNOW YOU DO NOT MEAN TO DO
22 THAT, BUT PLEASE ALLOW HER TO FINISH HER ANSWER.

23 MISS LEAHY: I AM SO SORRY, I DID
24 NOT REALISE I WAS INTERRUPTING YOU.

25 A. YES, I MEAN, THE CREDITOR WOULD

1 HAVE TO SHOW THAT IT WAS FAIR FOR HIM OR HER TO BE
2 PERMITTED TO BRING THE CLAIM OUTSIDE OF THE PROOF
3 OF DEBT PROCESS IN THE SITUATION THAT WE ARE
4 TALKING ABOUT.

5 BY MISS LEAHY:

6 Q. HE WOULD ALSO HAVE TO SHOW THAT HIS
7 CLAIM WAS ARGUABLE, WOULD HE NOT?

8 A. YES.

9 Q. BECAUSE THE COURT DOES NOT ACT IN
10 VAIN, DOES IT?

11 A. YES, THE COURT IS NOT GOING TO LIFT
12 THE STAY IN ORDER TO ALLOW SOMEONE TO BRING A
13 COMPLETELY FRIVOLOUS CLAIM THAT HAS GOT NO
14 PROSPECT OF SUCCESS.

15 Q. AS YOU SAID, HE COULD GO UNDER
16 SECTION THE 97 OR HE COULD JUST SUBMIT A PROOF OF
17 DEBT, RIGHT?

18 A. YES.

19 Q. IN THE REAL WORLD, THE CREDITOR IS
20 GENERALLY GOING TO SUBMIT A PROOF OF DEBT RATHER
21 THAN JUMP THROUGH THE SECTION 97 HOOPS, IS HE NOT?

22 MR. MORRIS: OBJECTION TO THE FORM
23 OF THE QUESTION.

24 A. I AM NOT SURE THAT YOU CAN
25 GENERALISE THAT WAY. I THINK, YOU KNOW, WE ARE

1 TALKING ABOUT THIS IN A HYPOTHETICAL SITUATION,
2 BUT I THINK, YOU KNOW, DEPENDING ON THE NATURE OF
3 THE CLAIM AND THE SIZE OF THE CLAIM, I COULD
4 CERTAINLY ENVISAGE THAT THERE COULD BE
5 CIRCUMSTANCES WHERE A CREDITOR WOULD WANT TO HAVE
6 HIS OR HER CLAIM DETERMINED IN A FULL LITIGATION
7 RATHER THAN USING THE PROOF OF DEBT PROCEDURE.

8 BY MISS LEAHY:

9 Q. AND IN AN INSOLVENT LIQUIDATION A
10 CREDITOR CAN ALSO APPLY TO THE COURT UNDER SECTION
11 97 AND SAY I DO NOT WANT TO USE THE PROOF OF DEBT
12 PROCEDURE, I WOULD LIKE TO ACTUALLY HAVE MY CLAIM
13 DETERMINED IN ORDINARY PROCEEDINGS. THAT IS
14 RIGHT, IS IT NOT?

15 A. IN AN INSOLVENT LIQUIDATION YOU CAN
16 APPLY UNDER SECTION 97 TO LIFT THE STAY, YES.

17 Q. YES. SO IN REAL TERMS, THERE IS NO
18 DIFFERENCE BETWEEN THE PROCESS THAT APPLIES FOR
19 CREDITOR CLAIMS IN A SOLVENT LIQUIDATION AND AN
20 INSOLVENT LIQUIDATION IS THERE?

21 MR. MORRIS: OBJECTION TO THE FORM
22 OF THE QUESTION.

23 A. THERE IS. THERE IS A BIG
24 DIFFERENCE. WE ARE TALKING AT THE MOMENT ABOUT
25 DISPUTED CLAIMS, BUT THE BIG DIFFERENCE ARISES IN

1 RELATION TO THE VAST MAJORITY OF CLAIMS, WHICH ARE
2 NOT DISPUTED, WHERE IN A SOLVENT LIQUIDATION THEY
3 ARE PAID IN THE ORDINARY COURSE AS AND WHEN THEY
4 ARISE. IN AN INSOLVENT LIQUIDATION, THE
5 LIQUIDATOR CANNOT PAY THEM IN THE ORDINARY COURSE,
6 HOWEVER MUCH HE MAY WANT TO, BECAUSE THEY HAVE TO
7 BE PAID RATABLY WITH THE OTHER CLAIMS AS PART OF A
8 COLLECTIVE PROCESS.

9 BY MISS LEAHY:

10 Q. I AM VERY SORRY, I MUST HAVE PUT MY
11 QUESTION UNCLEARLY. I AM LOOKING AT THE SITUATION
12 WHERE THE DEBTS ARE DISPUTED AND THE PROCESS THAT
13 APPLIES TO DISPUTED DEBTS, OKAY?

14 A. MMM-HMM.

15 Q. LET US JUST BREAK THE QUESTION
16 DOWN. WE ARE DEALING SOLELY WITH DISPUTED DEBTS,
17 OKAY? THAT IS NUMBER 1. NUMBER 2, WE ARE
18 LOOKING, FIRST OF ALL, AT SOLVENT LIQUIDATIONS
19 WHERE, AS YOU RIGHTLY IDENTIFIED, THE CREDITOR HAS
20 THREE CHOICES ESSENTIALLY: ABANDON HIS CLAIM, PUT
21 IN A PROOF, APPLY UNDER SECTION 97. THAT IS
22 CORRECT? THEN, LOOKING AT INSOLVENT LIQUIDATIONS,
23 THE CREDITOR HAS THREE CHOICES, DOES HE NOT:
24 ABANDON HIS CLAIM, PUT IN A PROOF, APPLY UNDER
25 SECTION 97?

1 MR. MORRIS: OBJECTION TO THE FORM
2 OF THE QUESTION.

3 A. YES.

4 BY MISS LEAHY:

5 Q. THAT IS RIGHT, IS IT NOT?

6 A. YES.

7 Q. SO IN FACT THE PROCEDURE THAT
8 APPLIES TO DISPUTED CREDITOR CLAIMS IN A SOLVENT
9 AND INSOLVENT LIQUIDATION IS THE SAME?

10 MR. MORRIS: OBJECTION TO THE FORM
11 OF THE QUESTION.

12 A. YOU ARE TALKING ABOUT THE PROCEDURE
13 FOR RESOLVING THE DISPUTE.

14 BY MISS LEAHY:

15 Q. YES, I AM.

16 A. YES.

17 Q. THAT IS ALL I AM ASKING YOU ABOUT.

18 A. OKAY. SO THE PROCEDURE FOR
19 RESOLVING THE DISPUTE IS THE SAME, BUT ONCE THE
20 DISPUTE IS RESOLVED, BECAUSE ONCE THAT DISPUTE IS
21 RESOLVED, WHICHEVER PROCESS IT IS RESOLVED BY,
22 THEN, YOU KNOW, THE DISPUTE IS GONE. THEN AGAIN,
23 YOU KNOW, YOU ARE IN A VERY DIFFERENT SITUATION AS
24 YOU ARE WITH THE DEBTS THAT WERE NOT DISPUTED IN
25 THE FIRST PLACE WHERE IF IT IS A SOLVENT

1 LIQUIDATION, THEY ARE GETTING PAID, YOU KNOW,
2 STRAIGHT AWAY, AND IF IT IS AN INSOLVENT
3 LIQUIDATION, THEY ARE GETTING PAID PARI PASSU AS
4 PART OF A COLLECTIVE PROCESS.

5 Q. I AM DEFINITELY GOING TO BE DEALING
6 WITH THAT POINT, SO DO NOT WORRY.

7 A. YES.

8 Q. I JUST WANT TO STAY FOCUSED ON THE
9 PROCEDURE BEFORE WE GET ON TO THAT, OKAY? JUST
10 FOR COMPLETENESS, IT IS RIGHT THAT IF A CREDITOR
11 IN A SOLVENT OR INSOLVENT LIQUIDATION SUBMITS A
12 PROOF OF DEBT, THE LIQUIDATOR ACTING IN A QUASI
13 JUDICIAL CAPACITY MUST ADJUDICATE ON THAT PROOF OF
14 DEBT?

15 A. YES.

16 Q. AND THE LIQUIDATOR CAN ADMIT IT,
17 REJECT IT IN WHOLE OR REJECT IT IN PART, CAN HE
18 NOT?

19 A. YES.

20 Q. AND IF HE REJECTS IT IN WHOLE OR IN
21 PART, THE CREDITOR HAS A RIGHT OF APPEAL TO THE
22 COURT?

23 A. YES.

24 Q. AND THAT IS THE SAME WHETHER IT IS
25 A SOLVENT OR INSOLVENT LIQUIDATION?

1 A. YES.

2 Q. CORRECT. IT IS ALSO RIGHT THAT IF
3 THE LIQUIDATOR ADMITS A DEBT THAT CREDITORS HAVE A
4 RIGHT TO APPLY TO COURT TO EXPUNGE THE PROOF?

5 A. YES.

6 MR. MORRIS: I AM SORRY, MAY I HAVE
7 THE QUESTION READ BACK.

8 MISS LEAHY: WE HAVE IT ON HERE.

9 MR. MCDONALD: YES.

10 THE COURT REPORTER: "IT IS ALSO
11 RIGHT THAT IF THE LIQUIDATOR ADMITS A DEBT THAT
12 CREDITORS HAVE A RIGHT TO APPLY TO COURT TO
13 EXPUNGE THE PROOF."

14 A. YES.

15 BY MISS LEAHY:

16 Q. NOW, JUST MOVING ON TO THE POINT
17 THAT YOU WERE EMPHASISING, WHICH IS THAT ONCE THE
18 ADJUDICATION HAS COMPLETED, THE LIQUIDATOR IN A
19 SOLVENT COMPANY CAN PAY THE CREDITORS IN FULL,
20 I THINK IS YOUR POINT, WHEREAS IN AN INSOLVENT
21 LIQUIDATION HE HAS TO WAIT UNTIL THE END OF THE
22 LIQUIDATION BEFORE HE CAN DECLARE A DIVIDEND. AM
23 I ACCURATELY SUMMARISING YOUR POINT?

24 A. YES. I MEAN, HE DOES NOT HAVE TO
25 WAIT UNTIL THE END OF THE LIQUIDATION NECESSARILY,

1 BUT HE HAS TO WAIT UNTIL THERE ARE SUFFICIENT
2 ASSETS AND THEN HE HAS TO DECLARE A DIVIDEND, AND
3 HE HAS TO PAY ALL THE CREDITORS AT THE SAME TIME.

4 Q. YES. WHAT ABOUT A COMPANY THAT IS
5 SOLVENT, IT HAS A HUGE REAL ESTATE EMPIRE AND THE
6 LIQUIDATOR IS GRADUALLY AFFECTING SALES OF THE
7 REAL ESTATE, IN THAT SITUATION, BECAUSE HE HAS NOT
8 REALISED THE COMPANY'S ASSETS AS YET, HE CANNOT
9 PAY THE CREDITORS' CLAIM AS THEY FALL DUE, CAN HE?

10 A. NO.

11 Q. BUT THE COMPANY IS STILL SOLVENT?

12 A. WELL, IT DEPENDS WHICH TEST OF
13 SOLVENCY YOU ARE USING, WHETHER YOU ARE USING THE
14 CASH FLOW TEST OR THE BALANCE SHEET TEST.

15 Q. SO IN THE SITUATION WHERE A
16 LIQUIDATOR HAS TO MAKE A SUMMARY DETERMINATION OF
17 WHETHER THE COMPANY IS SOLVENT OR INSOLVENT OR OF
18 DOUBTFUL SOLVENCY, HE PLAINLY APPLIES A BALANCE
19 SHEET TEST, DOES HE NOT?

20 A. YES.

21 Q. IF ONE STANDS BECOME AND THINKS
22 ABOUT THE PURPOSE OF THE DETERMINATION ----

23 A. YES.

24 Q. ---- IT IS TO WORK OUT WHETHER
25 CREDITORS ARE GOING TO BE PAID IN FULL OR NOT,

1 RIGHT?

2 A. YES, YES.

3 Q. AND IF THERE IS JUST SOME CASH FLOW
4 DIFFICULTIES, IT DOES NOT MEAN CREDITORS ARE NOT
5 GOING TO BE PAID IN FULL, IT IS JUST A TEMPORARY
6 SHORTAGE OF CASH, RIGHT?

7 A. YES.

8 MR. MORRIS: OBJECTION TO THE FORM
9 OF THE QUESTION.

10 BY MISS LEAHY:

11 Q. SO WHAT THE LIQUIDATOR IS
12 INTERESTED IN DOING IS ESTABLISHING WHETHER IT IS
13 BALANCE SHEET INSOLVENT OR NOT?

14 MR. MORRIS: OBJECTION TO THE FORM
15 OF THE QUESTION.

16 MR. MCDONALD: WHAT IS THE BASIS OF
17 THE OBJECTION TO THE FORM?

18 MR. MORRIS: IT ASSUMES FACTS NOT
19 IN EVIDENCE.

20 MISS LEAHY: IT IS AN HYPOTHETICAL
21 QUESTION.

22 MR. MORRIS: I UNDERSTAND THAT.

23 MISS LEAHY: THIS IS AN EXPERT
24 WITNESS.

25 MR. MORRIS: RIGHT. CAN I HAVE THE

1 QUESTION READ BACK AND I WILL TELL YOU EXACTLY
2 WHAT THE CALL IS?

3 THE COURT REPORTER: "SO WHAT THE
4 LIQUIDATOR IS INTERESTED IN DOING IS ESTABLISHING
5 WHETHER IT IS BALANCE SHEET INSOLVENT OR NOT?"

6 MR. MORRIS: YOU KNOW WHAT, I HAVE
7 MADE THE OBJECTION. NOW I WOULD HAVE TO HAVE THE
8 QUESTION BEFORE THAT READ BACK, AND IT IS JUST NOT
9 WORTH IT.

10 MR. MCDONALD: OKAY. CAN YOU READ
11 THAT BACK ONE MORE TIME?

12 MISS LEAHY: FOR THE BENEFIT OF
13 BOTH MYSELF AND THE WITNESS, I THINK I AM JUST
14 GOING TO REPEAT THE QUESTION, BECAUSE I MIGHT BE A
15 BIT LOST NOW.

16 MR. MORRIS: YES, THAT IS FINE.
17 BY MISS LEAHY:

18 Q. WE WERE DISCUSSING THE ORDER 8
19 DETERMINATION?

20 A. YES.

21 Q. AND IN THAT CONTEXT WHAT I WAS
22 SUGGESTING TO YOU IS THE LIQUIDATOR WAS INTERESTED
23 IN DETERMINING WHETHER THE COMPANY WAS BALANCE
24 SHEET SOLVENT OR NOT. WOULD YOU AGREE WITH THAT?

25 A. PRINCIPALLY, YES, YES. YES.

1 Q. PRINCIPALLY? IS THERE A SHADOW OF
2 DOUBT THERE, AND WHY IS THAT?

3 A. WELL, IT IS A SUMMARY
4 DETERMINATION.

5 Q. YES.

6 A. AND IF YOU ARE THE LIQUIDATOR AND
7 YOU DETERMINE IT TO BE SOLVENT, THEN YOU GET
8 YOURSELF INTO ORDER 16, RULE 1 AND HAVING TO PAY
9 CREDITORS AS THEY FALL DUE. SO, IF YOU HAVE A
10 COMPANY, EVEN, YOU KNOW, IN YOUR HYPOTHETICAL
11 SITUATION WHERE IT HAS A LOT OF ILLIQUID ASSETS
12 AND IT IS GOING TO BE ABLE TO PAY EVERYONE IN FULL
13 AT THE END OF THE DAY BUT ITS CASH FLOW INSOLVENT
14 SO IT CANNOT -- THE LIQUIDATOR CANNOT COMPLY WITH
15 ORDER 16, RULE 1 AND PAY ITS DEBTS IN THE ORDINARY
16 COURSE, THEN, YOU KNOW, IF I WAS ADVISING A
17 LIQUIDATOR IN THAT KIND OF SITUATION IN THE COURSE
18 OF MY PRACTICE, FIRSTLY, I WOULD TAKE A LOT MORE
19 TIME TO CONSIDER THE ISSUE THAN I HAVE GOT RIGHT
20 NOW, BUT MY FIRST BLUSH VIEW IS THAT YOU MIGHT IN
21 THAT SITUATION WANT TO THINK ABOUT WHETHER IT IS
22 TRULY SOLVENT OR WHETHER YOU WANT TO ADMIT AN
23 ELEMENT OF CASH FLOW SOLVENCY INTO YOUR
24 DETERMINATION AND THINK ABOUT WHETHER IT IS OF
25 DOUBTFUL SOLVENCY.

1 Q. OKAY. SO IN THAT SITUATION, WOULD
2 YOU SUGGEST IT IS APPROPRIATE THAT CREDITORS HAVE
3 -- IT DOES NOT MATTER WHETHER WE CLASSIFY IT AS
4 DOUBTFUL SOLVENCY OR WHAT, BUT THE SITUATION WE
5 ARE DISCUSSING, WOULD YOU SUGGEST THAT CREDITORS'
6 VIEWS SHOULD BE TAKEN INTO ACCOUNT BY THE COURT?

7 A. WHETHER THEY SHOULD BE AS A MATTER
8 OF PRINCIPLE OR WHETHER THEY WOULD BE UNDER OUR
9 STATUTORY REGIME, THOSE ARE TWO DIFFERENT THINGS,
10 SO WHICH IS YOUR QUESTION?

11 Q. AS A MATTER OF PRINCIPLE SHOULD
12 THEY BE TAKEN INTO ACCOUNT IN THAT SITUATION?
13 WHAT IS YOUR VIEW?

14 A. AS A MATTER OF PRINCIPLE WHERE, YOU
15 KNOW, CREDITORS ARE NOT GETTING PAID IN THE
16 ORDINARY COURSE, I WOULD SAY THERE IS AT LEAST AN
17 ARGUMENT THAT THEY SHOULD BE.

18 Q. BUT YOU WOULD SAY THAT UNDER THE
19 RULES THEY ARE BARRED FROM PARTICIPATING IN THE
20 WINDING UP?

21 A. IF THE LIQUIDATOR HAS DETERMINED
22 THE COMPANY TO BE SOLVENT. THAT IS WHY I QUERY
23 WHETHER IN THAT SITUATION THE LIQUIDATOR SHOULD
24 DETERMINE IT TO BE OF DOUBTFUL SOLVENCY, BECAUSE
25 THAT WAY YOU BRING THE CREDITORS IN AND YOU GIVE

1 THEM A SEAT AT THE TABLE.

2 Q. AND WHAT IF THE CREDITORS WENT TO
3 COURT AND SAID TO THE JUDGE, THE LIQUIDATOR HAS
4 DETERMINED THAT IT IS SOLVENT, I AM NOT GETTING
5 PAID IN THE ORDINARY COURSE AND THEREFORE I AM
6 POTENTIALLY AT RISK OF NOT BEING PAID IN FULL,
7 I WANT YOU TO HEAR ME ON THE FOLLOWING
8 APPLICATIONS, WOULD THE COURT ENTERTAIN THAT
9 APPLICATION?

10 A. IT IS AN INTERESTING QUESTION, IS
11 IT NOT? I MEAN, AGAIN, THIS IS SOMETHING THAT I
12 WOULD WANT TO THINK ABOUT A LOT MORE, BUT I WOULD
13 HAVE THOUGHT, YOU KNOW, IN THAT CASE, THEN THE
14 COURT MIGHT WELL SAY TO THE LIQUIDATORS, LOOK, YOU
15 HAVE CERTIFIED THIS COMPANY TO BE SOLVENT BUT YOUR
16 CREDITORS ARE NOT GETTING PAID, THE COURT MIGHT
17 SAY TO THE LIQUIDATOR RECERTIFY IT AS DOUBTFUL
18 SOLVENCY, GIVE YOUR CREDITORS A SEAT, GIVE THEM A
19 VOICE, THEY NEED TO BE HEARD.

20 Q. BUT THE COURT COULD ONLY DO THAT IF
21 IT WAS PREPARED TO HEAR THE CREDITOR IN THE FIRST
22 INSTANCE. THAT IS RIGHT, IS IT NOT?

23 A. WELL, NO, I AM NOT SURE I AGREE
24 WITH THAT, BECAUSE THE COURT CAN -- I MEAN,
25 SOMEONE WOULD HAVE TO DRAW THE SITUATION TO THE

1 COURT'S ATTENTION.

2 Q. THAT IS MY POINT. SO THE CREDITOR
3 HAS TO APPLY TO COURT SAYING YOU NEED TO GIVE
4 DIRECTIONS TO YOUR OFFICERS BECAUSE THEY HAVE MADE
5 THIS DETERMINATION, AND IT IS NOT FAIR. THE
6 CREDITOR WOULD HAVE TO MAKE THAT APPLICATION TO
7 COURT, WOULD IT NOT?

8 A. WELL, I DO NOT THINK THE COURT
9 WOULD NECESSARILY NEED A FORMAL APPLICATION FROM A
10 CREDITOR.

11 Q. A LETTER INSTEAD?

12 A. THE COURT WOULD NEED TO KNOW THAT
13 CREDITORS WERE NOT GETTING PAID. THE COURT WOULD
14 WANT TO SEE EVIDENCE FROM THE LIQUIDATOR.
15 I CANNOT CONCEIVE -- I MEAN, YOU KNOW, IN THIS
16 THESE KIND OF SITUATIONS IT IS THE LIQUIDATOR'S
17 DUTY TO ASSIST THE COURT AND TO APPRISE THE COURT
18 OF THE FACTUAL SITUATION AND WHAT IS GOING ON IN
19 THE LIQUIDATION. SO, YOU KNOW, WE ARE DEALING
20 WITH THESE HYPOTHETICAL SCENARIOS WHICH ARE
21 DIFFICULT TO DEAL WITH IN THEORY, BUT IN PRACTICE
22 I CANNOT ENVISAGE A CAYMAN LIQUIDATOR WHO WOULD
23 NOT PUT IN A REPORT AND WHO WOULD NOT ADMIT AND
24 ACCEPT, LOOK, YES, I CANNOT PAY THESE CREDITORS.
25 THIS IS THE SITUATION. I HAVE GOT ALL THIS REAL

1 ESTATE. I AM HOPING TO SELL IT WITHIN THIS TIME
2 FRAME BUT I HAVE THESE DEBTS AND THE DEBTS ARE
3 DUE. YOU KNOW, THE LIQUIDATOR'S ROLE IS TO BE
4 NEUTRAL AND TO ASSIST THE COURT AND SET OUT THE
5 FACTS. SO, I THINK IN THE SITUATION THAT YOU ARE
6 TALKING ABOUT, I DO NOT THINK YOU WOULD NEED A
7 FORMAL APPLICATION NECESSARILY FROM THE CREDITOR.
8 OBVIOUSLY SOMEONE SOMEHOW IS GOING TO HAVE TO
9 BRING IT TO THE JUDGE'S ATTENTION, BUT I THINK IT
10 IS REALLY THE LIQUIDATOR'S ROLE TO SET OUT THE
11 FACTUAL POSITION. THE JUDGE CAN GIVE HIS OR HER
12 OWN OFFICERS WHATEVER DIRECTION HE OR SHE THINKS
13 FIT, WITH OR WITHOUT AN APPLICATION FROM THEM OR
14 FROM ANOTHER PARTY.

15 Q. I THINK WHAT YOU ARE SAYING IS THAT
16 THERE ARE MECHANISMS IN PLACE TO PROTECT THE
17 INTEREST OF CREDITORS, EVEN IF A CREDITOR CANNOT
18 ACTUALLY BRING AN APPLICATION TO COURT ITSELF?

19 MR. MORRIS: OBJECTION TO THE FORM
20 OF THE QUESTION.

21 A. NO, I DO NOT THINK THAT IS WHAT
22 I AM SAYING, BECAUSE THERE IS NOT A FORMAL
23 MECHANISM FOR A CREDITOR.

24 BY MISS LEAHY:

25 Q. I DID NOT SAY THE WORD "FORMAL".

1 I SAID THERE ARE MECHANISMS IN PLACE TO PROTECT
2 THE INTEREST OF CREDITORS, AND YOU SEEM TO ME TO
3 HAVE JUST GIVEN AN EXAMPLE. YOU SAID THE
4 LIQUIDATOR HAS TO REPORT TO THE COURT, THE
5 LIQUIDATOR IS AN OFFICER OF THE COURT WHO HAS A
6 DUTY TO BE NEUTRAL AND THE COURT HAS GOT THE POWER
7 TO GIVE DIRECTIONS TO ITS OFFICERS. I AM SLIGHTLY
8 PARAPHRASING YOUR EVIDENCE, BUT I THOUGHT THAT WAS
9 THE GIST OF IT.

10 A. YES.

11 Q. IS IT WRONG TO SAY THERE ARE
12 MECHANISMS IN PLACE TO PROTECT THE INTEREST OF
13 CREDITORS?

14 MR. MORRIS: OBJECTION TO THE FORM
15 OF THE QUESTION.

16 A. THE MECHANISM WOULD BE FOR THE
17 JUDGE TO -- YOU KNOW, FOR THE LIQUIDATOR TO CHANGE
18 HIS OR HER SOLVENCY DETERMINATION AND BRING THE
19 CREDITORS IN, BECAUSE SO LONG AS IT REMAINS
20 SOLVENT THERE IS NOT A MECHANISM FOR CREDITORS TO
21 BE HEARD. AS SOON AS THE DETERMINATION IS CHANGED
22 TO DOUBTFUL SOLVENCY, YOU KNOW, THEN THEY ARE IN
23 AND CREDITORS AND CONTRIBUTORIES HAVE A VOICE.

24 BY MISS LEAHY:

25 Q. HENCE THE INITIAL STAGE WHERE

1 I THINK YOU ARE SAYING THE CREDITOR CANNOT MAKE AN
2 APPLICATION.

3 A. HMM.

4 Q. YOU SAY THAT THE CREDITOR IS NOT AT
5 RISK IN THAT SITUATION BECAUSE OF COURSE EITHER
6 THROUGH A REPORT OR THROUGH SOME OTHER MECHANISM
7 THE COURT CAN DIRECT THE LIQUIDATOR TO CHANGE THE
8 DETERMINATION, RIGHT?

9 A. HMM.

10 Q. SO THAT IS THE COURT INTERVENING,
11 IS IT NOT, ON BEHALF OF THE CREDITORS TO ASSIST
12 THEM?

13 A. YES, IN THAT SITUATION, YES,
14 ALTHOUGH I THINK -- WE ARE IN QUITE A FARFETCHED
15 HYPOTHETICAL SITUATION HERE. I THINK WHAT IS FAR
16 MORE LIKELY IS THAT THE LIQUIDATOR WOULD OF HIS OR
17 HER OWN INITIATIVE CHANGE THE DETERMINATION
18 BECAUSE LIQUIDATORS DO NOT TYPICALLY WANT TO SHUT
19 CREDITORS OUT.

20 Q. FINE. WE ARE JUST GOING TO TAKE A
21 SHORT BREAK.

22 A. OKAY.

23 Q. AS EXPLAINED BEFORE, YOU REMAIN
24 UNDER OATH DURING THE BREAKS.

25 A. YES.

1 Q. SO PLEASE DO NOT DISCUSS YOUR
2 EVIDENCE WITH YOUR SIDE?

3 A. YES, THAT IS FINE.

4 Q. TEN MINUTES?

5 A. SURE.

6 (A SHORT BREAK FROM 11.06 A.M. TO 11.20 A.M.)

7 THE COURT REPORTER: WE ARE GOING
8 BACK ON THE RECORD AT 11.20.

9 BY MISS LEAHY:

10 Q. MISS PEARSON, IN EVERY LIQUIDATION,
11 SOLVENT OR INSOLVENT, THE CREDITORS HAVE TO SUBMIT
12 THEIR CLAIMS TO THE LIQUIDATOR, DO THEY NOT?

13 A. YES.

14 Q. AND IT IS THE LIQUIDATOR WHO
15 DECIDES WHETHER THE CLAIMS ARE DISPUTED OR NOT, IS
16 IT NOT?

17 A. YES.

18 Q. AND IT IS ALSO THE LIQUIDATOR WHO
19 AFFECTS PAYMENT OF CLAIMS WHICH HE DOES NOT
20 DISPUTE; THAT IS CORRECT?

21 A. YES.

22 Q. ONCE A CREDITOR IS PAID IN FULL,
23 WITH STATUTORY INTEREST, THEY ARE ACTUALLY NO
24 LONGER A CREDITOR OF THE COMPANY, ARE THEY?

25 A. NO.

1 Q. SO THEREFORE THEY OBVIOUSLY DO NOT
2 HAVE ANY INTEREST WHATSOEVER IN THE LIQUIDATION OF
3 PROCEEDINGS, DO THEY?

4 A. NO.

5 Q. BUT UNTIL THAT TIME COMES, THEY
6 HAVE GOT EXTANT CLAIMS AGAINST THE COMPANY, THAT
7 THEY ARE BARRED FROM ENFORCING WITHOUT THE LEAVE
8 OF THE COURT. THAT IS RIGHT?

9 A. YES.

10 Q. SO EVEN IF EVERYONE HOPES AND
11 ANTICIPATES THAT THEY ARE GOING TO BE PAID IN FULL
12 WITH INTEREST, UNLESS AND UNTIL THEY ARE, THERE IS
13 A RISK THAT THEY MIGHT NOT BE?

14 A. YES.

15 Q. AND FOR AS LONG AS THAT RISK
16 SUBSISTS, THE OFFICIAL LIQUIDATOR IS DUTY BOUND
17 NOT TO TAKE STEPS TO HARM THOSE CREDITORS'
18 INTEREST?

19 A. WELL, I MEAN, IN THE SAME WAY THAT
20 IF I OWE SOMEONE MONEY, I AM, YOU KNOW, DUTY
21 BOUND. YOU SAY DUTY BOUND NOT TO KIND OF GO AND
22 HIDE ALL MY ASSETS AND NOT PAY THEM. WHAT DO YOU
23 MEAN BY DUTY BOUND?

24 Q. WELL, HE CANNOT PRIORITIES THE
25 INTEREST OF THE SHAREHOLDERS OVER THE INTEREST OF

1 THE CREDITORS WHILE THERE REMAINS A RISK THAT THE
2 CREDITORS MIGHT NOT BE PAID IN FULL?

3 MR. MORRIS: I AM SORRY ARE WE IN A
4 SOLVENT OR INSOLVENT SITUATION?

5 MISS LEAHY: WE ARE IN A SOLVENT
6 SITUATION.

7 MR. MORRIS: OBJECTION TO THE FORM
8 OF THE QUESTION.

9 A. SORRY, DID YOU SAY SOLVENT OR
10 INSOLVENT?

11 BY MISS LEAHY:

12 Q. SOLVENT.

13 A. WELL, I MEAN, I THINK I SAID YES TO
14 YOU WHEN YOU SAID THAT THERE IS A RISK THAT THE
15 CREDITORS MAY NOT GET PAID IN FULL. PERHAPS
16 I SHOULD NOT HAVE SAID YES BECAUSE -- I GUESS
17 THERE IS ALWAYS A RISK. YOU KNOW, I ISSUE AN
18 INVOICE TO A CLIENT, UNTIL THEY HAVE PAID ME THERE
19 IS A RISK I MIGHT NOT GET PAID. YOU KNOW, IS IT A
20 REAL RISK? YOU KNOW, DOES IT MEAN THAT THEY ARE
21 INSOLVENT? NO. IT IS A THEORETICAL RISK THERE IS
22 A VERY SMALL RISK, BUT I THINK YOU ARE TAKING THAT
23 ASSUMPTION AND TRYING TO TAKE IT -- CAN WE ----

24 Q. I AM SO SORRY, I JUST DID NOT THINK
25 IT WOULD BE CONTROVERSIAL TO SAY THAT A LIQUIDATOR

1 WHO IS AN OFFICER OF THE COURT SHOULD NEVER DO
2 SOMETHING, IN FACT IS DUTY BOUND NOT TO TAKE ANY
3 STEPS THAT WOULD HARM THE INTEREST OF THE
4 CREDITORS OF THE COMPANY, WHETHER IT IS SOLVENT OR
5 INSOLVENT.

6 A. YES. I MEAN, YES, HE IS NOT GOING
7 TO START, YOU KNOW, HIDING ASSETS OR, YOU KNOW,
8 TRYING TO -- HE IS NOT GOING TO START DOING THINGS
9 TO EVADE PAYING THE COMPANY'S DEBTS.

10 Q. IT IS MORE THAT HE -- LESS THAN HE
11 WILL NOT, BUT HE SHOULD NOT?

12 A. NO, HE SHOULD NOT, NO. AS I SAY, I
13 THINK I AM GETTING -- I THINK IT IS THE DUTY BOUND
14 PART THAT I AM KIND OF TAKING ISSUE WITH BECAUSE
15 HIS DUTIES ARE TO HIS STAKEHOLDERS, WHICH IN THAT
16 CASE ARE THE SHAREHOLDERS.

17 Q. BUT IT DOES NOT MEAN THAT THE
18 INTEREST OF CREDITORS ARE SUBORDINATED TO THE
19 INTEREST OF THE SHAREHOLDERS, DOES IT? YOU ARE
20 NOT SUGGESTING THAT?

21 A. NO, CERTAINLY NOT THAT THEY ARE
22 SUBORDINATED, IT IS JUST THAT THEY ARE GOING TO
23 GET PAID SO THEY DO NOT HAVE A FINANCIAL INTEREST
24 IN THE LIQUIDATION. THEY ARE NOT A STAKEHOLDER IN
25 THE LIQUIDATION. THEY ARE NOT BEARING THE COSTS

1 OF THE LIQUIDATION AND THEY ARE NOT AFFECTED BY
2 THE STEPS THAT THE LIQUIDATOR IS TAKING IN TERMS
3 OF REALISING THE ASSETS, BECAUSE THEY ARE NOT
4 GOING TO GET A SHARE OF THOSE ASSETS BECAUSE THEY
5 ARE GETTING PAID THEIR WHOLE CLAIM ANYWAY.

6 Q. WE MAY JUST BE GOING AROUND IN
7 CIRCLES, BUT I THOUGHT YOU ACKNOWLEDGED THAT THERE
8 WAS A RISK, EVEN IF YOU WANT TO CALL IT A
9 THEORETICAL RISK, THAT THEY MIGHT NOT GET PAID IN
10 FULL. MY POINT TO YOU IS WHILE THAT RISK
11 SUBSISTS, THEN SURELY THE LIQUIDATOR CANNOT AND
12 SHOULD NOT DO ANYTHING THAT MIGHT HARM THE
13 INTEREST OF CREDITORS?

14 MR. MORRIS: OBJECTION TO THE FORM
15 OF THE QUESTION.

16 A. YES, I AGREE THAT HE CANNOT AND
17 SHOULD NOT BE TAKING STEPS THAT WOULD CHANGE HIM
18 FROM BEING ABLE TO PAY CREDITORS TO BEING UNABLE
19 TO PAY THEM.

20 BY MISS HEALY:

21 Q. AND THE COURT IS NOT GOING TO
22 SANCTION THE EXERCISE OF A POWER THAT MIGHT PUT
23 THE CREDITORS INTEREST AT RISK, IS IT?

24 A. NO.

25 Q. SO IF A LIQUIDATOR GOES TO COURT

1 AND APPLIES FOR SANCTION TO COMMENCE LITIGATION --
2 WE SEE THEM ALL THE TIME -- THE COURT WILL HAVE
3 REGARD WHEN IT IS CONSIDERING THE LIQUIDATOR'S
4 REPORT TO THE INTEREST OF ANY CREDITORS WHO HAVE
5 NOT YET BEEN PAID, WILL IT NOT?

6 A. WELL, I THINK THE COURT --
7 CERTAINLY THE COURT WOULD NOT SANCTION THE
8 LIQUIDATOR TAKING A STEP THAT JEOPARDIZED HIS
9 ABILITY TO PAY THOSE CREDITORS, BUT PROVIDED THEY
10 ARE GOING TO BE PAID, AND WHATEVER STEP HE IS
11 SEEKING SANCTION OF DOES NOT JEOPARDIZE THAT,
12 THEN, YOU KNOW, THEY ARE OUT, THEY ARE NOT THE
13 STAKEHOLDERS IN THE LIQUIDATION. SO IT IS THE
14 SHAREHOLDERS' VIEWS AS TO WHAT THE LIQUIDATOR
15 SHOULD BE DOING THAT CARRY WEIGHT WITH THE COURT.

16 Q. SO LET US TAKE AN APPLICATION FOR
17 SANCTION BY THE LIQUIDATOR ----

18 A. YES.

19 Q. ---- WHICH THE COURT, LET US JUST
20 SAY, IS JUST A LITTLE WORRIED MIGHT PUT THE
21 CREDITORS' INTEREST AT RISK AND THE LIQUIDATOR
22 SAYS, WELL, I AM SOLVENT. IN THAT SITUATION, THE
23 COURT HAS A NUMBER OF OPTIONS, DOES IT NOT? IT
24 COULD JUST REFUSE SANCTION. THAT IS ONE OPTION.
25 ANOTHER OPTION IS THAT IT COULD DIRECT NOTICE TO

1 BE GIVEN TO THE CREDITORS SO THEY COULD COME AND
2 MAKE REPRESENTATIONS.

3 A. MMM-HMM.

4 Q. AND THE THIRD OPTION, AND YOU CAN
5 ANSWER THE QUESTION AT THE END IF YOU PREFER, IS
6 THAT YOU COULD SAY TO THE LIQUIDATOR, ACTUALLY,
7 I WANT TO HEAR ADVERSARIAL ARGUMENT ON THIS. SO
8 YOU, LIQUIDATOR, YOU BE THE VOICE OF THE UNSECURED
9 CREDITORS AND THE SHAREHOLDERS CAN HAVE THEIR OWN
10 REPRESENTATIVE. THEY CAN COME TO COURT BY
11 MISS PEARSON AND SHE CAN PERSUADE ME AS TO WHY
12 I SHOULD GIVE SANCTION. THOSE ARE SORT OF THE
13 THREE -- OR HE COULD BE PERSUADED THAT HE SHOULD
14 NOT, BUT THOSE ARE THE THREE -- IF THE COURT HAS
15 GOT ANY DOUBT, THOSE ARE THE SORT OF THREE OPTIONS
16 AVAILABLE TO THE COURT, ARE THEY NOT?

17 A. WELL, I THINK THERE IS ANOTHER
18 OPTION THAT I THINK IS POSSIBLY MORE LIKELY THAN
19 THE ONES THAT YOU HAVE OUTLINED, WHICH IS THAT IF
20 THE COURT THINKS THE CREDITORS NEED A VOICE AND
21 THEY NEED TO BE HEARD ON THE SANCTION APPLICATION,
22 THEN THE OBVIOUS STEP WOULD BE TO TELL THE
23 LIQUIDATOR TO CHANGE HIS OR HER SOLVENCY
24 DETERMINATION. THEN IF IT IS DOUBTFUL SOLVENCY,
25 THEN BOTH CREDITORS AND CONTRIBUTORIES CAN BE

1 HEARD ON THE SANCTION APPLICATION AND THE COURT
2 CAN PAY ATTENTION TO EVERYBODY'S VIEWS. I THINK
3 IT WOULD BE VERY UNLIKELY THAT THERE WOULD BE A
4 SOLVENT LIQUIDATION AND THE JUDGE WOULD, YOU KNOW,
5 PERMIT IT TO BE CONTINUING AS A SOLVENT
6 LIQUIDATION BUT STILL SAY, OH, BUT THE CREDITORS
7 NEED TO BE HEARD, SO I AM GOING TO ALLOW THEM TO
8 BE HEARD EVEN THOUGH THE ACT SPECIFICALLY SAYS
9 THAT THEY DO NOT HAVE STANDING TO BE HEARD ON A
10 SANCTION APPLICATION BY THE LIQUIDATOR OF A
11 SOLVENT COMPANY.

12 Q. SHALL WE JUST LOOK AT THE RELEVANT
13 PROVISIONS? TURN TO ORDER 11 -- WE DO NOT HAVE
14 THE SAME PAGE NUMBERS IN THE ORDER -- IT IS PAGE
15 74 ON MINE.

16 A. OKAY, I WILL FIND IT. YES.

17 Q. WE CAN AGREE THAT IN A SOLVENT
18 LIQUIDATION CREDITORS DO NOT HAVE STANDING TO MAKE
19 A SANCTION APPLICATION?

20 A. YES.

21 Q. THAT IS COMMON GROUND?

22 A. YES.

23 Q. WE CAN ALSO AGREE THAT IN AN
24 INSOLVENT LIQUIDATION CONTRIBUTORIES DO NOT HAVE
25 STANDING TO MAKE AN APPLICATION?

1 A. YES.

2 Q. BUT I AM WANTING JUST TO LOOK AT
3 THE MOMENT AT LIQUIDATOR'S APPLICATIONS FOR
4 SANCTION, OKAY?

5 A. YES.

6 Q. IF YOU GO TO RULE 2 OF ORDER 11 AND
7 THEN GO TO 2(1): "EVERY SANCTION APPLICATION MADE
8 BY THE OFFICIAL LIQUIDATOR SHALL BE SERVED ON",
9 AND THEN, "(A) EACH MEMBER OF THE LIQUIDATION
10 COMMITTEE; OR (B) COUNSEL TO THE LIQUIDATION
11 COMMITTEE ... AND (C) SUCH OTHER CREDITORS OR
12 CONTRIBUTORIES AS THE COURT MAY DIRECT."

13 A. YES.

14 Q. SO THE COURT, ON THE FACE OF RULE
15 2(1), HAS GOT POWER ON AN APPLICATION BY THE
16 OFFICIAL LIQUIDATOR TO DIRECT THAT OTHER CREDITORS
17 OR CONTRIBUTORIES ARE TO BE SERVED. THEN, I KNOW
18 YOU REFERENCE THIS IN YOUR DECLARATION, IF YOU GO
19 OVER TO RULE 3, AND I THINK IT IS 3(4) THAT YOU
20 MADE REFERENCE TO, IT SAYS: "IN ADDITION TO THOSE
21 WHO WERE ENTITLED TO BE SERVED IN ACCORDANCE WITH
22 RULE 2, THE COURT MAY ALLOW THE FOLLOWING CLASSES
23 OF PERSONS TO BE HEARD." THEN WE HAVE, "(A) ANY
24 OTHER CREDITOR, IF THE COMPANY IS INSOLVENT; (B)
25 ANY OTHER CONTRIBUTORY, IF THE COMPANY IS

1 SOLVENT", AND THEN THE DOUBTFUL SOLVENCY
2 PROVISION. I THINK WHAT YOU ARE SAYING IS THAT
3 SOMEHOW RULE 3(4) GOVERNS RULE 2(1) AND THEREFORE
4 THE COURT CAN ONLY DIRECT THAT ANOTHER CREDITOR OR
5 CONTRIBUTORY OR -- ANOTHER CREDITOR IS SERVED IF
6 THE COMPANY IS INSOLVENT. IS THAT WHAT YOU ARE
7 SAYING?

8 A. I AM NOT SAYING THAT 3(4) GOVERNS
9 2(1), BUT IF WE LOOK AT THE ACT, AT SECTION
10 110 ----

11 Q. THAT IS PAGE 64.

12 A. IT IS 84 IN MINE.

13 Q. IT IS 84. IT IS JUST MY EYESIGHT.

14 A. SO IF WE LOOK AT SECTION 110(4)(A),
15 IT SAYS: "IN THE CASE OF A SOLVENT COMPANY, A
16 SANCTION APPLICATION MAY ONLY BE HEARD BY A
17 CONTRIBUTORY AND THE CREDITORS SHALL HAVE NO RIGHT
18 TO BE HEARD."

19 Q. YES.

20 A. SO I WOULD READ NO RIGHT TO BE
21 HEARD AS MEANING ON A SANCTION APPLICATION MADE BY
22 ANOTHER CONTRIBUTORY OR MADE BY THE LIQUIDATOR,
23 HIM OR HERSELF.

24 Q. WHERE DO YOU READ THE WORDS "OR THE
25 LIQUIDATOR, HIM OR HERSELF" INTO THAT RULE?

1 A. WELL, JUST COMMON SENSE, BECAUSE
2 OTHERWISE YOU ARE READING IT AS THE CREDITORS
3 SHALL HAVE NO RIGHT TO BE HEARD ON A SANCTION
4 APPLICATION MADE BY A CONTRIBUTORY, BUT YOU ARE
5 SAYING THEY DO HAVE THE RIGHT TO BE HEARD ON A
6 SANCTION APPLICATION MADE BY THE LIQUIDATOR, AND
7 WHY SHOULD THERE BE A DISTINCTION THERE?

8 Q. WELL, THEY ARE VERY DIFFERENT
9 APPLICATIONS, ARE THEY NOT, BECAUSE THE LIQUIDATOR
10 HAS TO APPLY TO COURT TO EXERCISE HIS POWERS UNDER
11 THE PART 1 OF SCHEDULE 3, SO THE LIQUIDATOR HAS TO
12 MAKE SIGNIFICANT AND NUMEROUS APPLICATIONS FOR
13 SANCTION, DOES HE NOT?

14 A. YES, THE LIQUIDATOR MAKES -- IT IS
15 MUCH MORE COMMON, I AGREE, IF THIS IS YOUR POINT,
16 FOR A SANCTION APPLICATION TO BE MADE BY A
17 LIQUIDATOR THAN BY A CREDITOR OR A CONTRIBUTORY.
18 I AGREE WITH THAT, BUT I DO NOT SEE WHY THAT WOULD
19 MEAN THAT THERE IS A DIFFERENCE IN TERMS OF WHO
20 HAS STANDING TO BE HEARD BECAUSE OF WHO IS
21 BRINGING THE APPLICATION. THEN ALSO IF YOU ARE
22 SAYING THAT A CREDITOR HAS THE RIGHT TO BE HEARD
23 ON A SANCTION APPLICATION IN RELATION TO A SOLVENT
24 COMPANY, IF IT IS BROUGHT BY THE LIQUIDATOR BUT
25 NOT BY A CONTRIBUTORY, THEN THAT JUST GOES AGAINST

1 THE GRAIN OF ALL OF THE CASE LAW THAT SAYS IT IS
2 THE PEOPLE WITH THE ECONOMIC INTEREST IN THE
3 LIQUIDATION THAT HAVE THE RIGHT TO BE HEARD, AND
4 THEREFORE ON A SOLVENT LIQUIDATION IT IS THE
5 CONTRIBUTORIES AND ON AN INSOLVENT LIQUIDATION IT
6 IS THE CREDITORS.

7 Q. OKAY. I THINK THERE ARE TWO POINTS
8 THERE. THE SECOND POINT, THE CASE LAW POINT,
9 I WILL COME BACK TO IN A MOMENT. JUST FOCUS ON,
10 IF YOU LIKE, THE STANDING POINT AS OPPOSED TO WHAT
11 I CALL THE WEIGHT POINT.

12 A. MMM-HMM.

13 Q. IF YOU LOOK AT SECTION 110, THE
14 HEADING IS "FUNCTION AND POWERS OF OFFICIAL
15 LIQUIDATORS", AND IF YOU GO TO SUBSECTION (3),
16 "THE EXERCISE BY THE LIQUIDATOR OF THE POWERS
17 CONFERRED BY THIS SECTION IS SUBJECT TO THE
18 CONTROL OF THE COURT", AND "SUBJECT TO (5), ANY
19 CREDITOR OR CONTRIBUTORY MAY APPLY TO THE COURT
20 WITH RESPECT TO THE EXERCISE OF PROPOSED EXERCISE
21 OF SUCH POWERS." THEN IN (4) IS THE SECTION THAT
22 YOU WERE REFERENCING. SO (4) IS EXPLAINING WHO
23 MAY MAKE THE APPLICATION, CALLED THE SANCTION
24 APPLICATION, REFERENCED IN (3), RIGHT?

25 A. WELL, WHO MAY MAKE IT AND WHO MAY

1 BE HEARD.

2 Q. BUT (3) IS TALKING ABOUT WHO MAY
3 MAKE AN APPLICATION, RIGHT, AND THEN (4)
4 ESSENTIALLY CAVEATS THAT, BUT IT IS NOT IN ANY WAY
5 DEALING WITH THE LIQUIDATOR MAKING AN APPLICATION?
6 IT IS SOLELY DEALING WITH CREDITORS AND
7 CONTRIBUTORIES' APPLICATIONS?

8 A. NO, I DO NOT AGREE.

9 Q. THEN IF YOU GO BACK TO ORDER 11,
10 AND LOOK AT RULE 2 AGAIN, WE SEE THAT THE COURT
11 HAS GOT POWER TO ORDER "SUCH OTHER CREDITORS OR
12 CONTRIBUTORIES AS THE COURT MAY DIRECT" TO BE
13 SERVED", YES?

14 A. YES.

15 Q. AND THEN IF YOU GO TO RULE 3(4),
16 "IN ADDITION TO THOSE WHO ARE ENTITLED TO BE
17 SERVED IN ACCORDANCE WITH RULE 2, THE COURT MAY
18 ALLOW THE FOLLOWING CLASSES OF PERSONS TO BE
19 HEARD." RIGHT?

20 A. YES.

21 Q. SO THE PERSONS WHO CAN BE HEARD IS
22 EVERY PERSON THE COURT HAS DIRECTED BE SERVED WITH
23 THE APPLICATION AND ANY OTHER CREDITOR IF THE
24 COMPANY IS INSOLVENT. SO ACTUALLY AS A MATTER OF
25 FACT THE COURT DOES HAVE POWER, DOES IT NOT, TO

1 SIMPLY DIRECT THAT THE CREDITOR OF A SOLVENT
2 COMPANY IS GIVEN NOTICE OF THE APPLICATION AND
3 THEREFORE THAT CREDITOR BECOMES A PERSON THAT IT
4 IS ENTITLED TO HEAR FROM IN SUBMISSIONS, IN DUE
5 COURSE?

6 A. NO, I DO NOT READ RULE 2(3)(D) AS
7 MEANING THAT THE COURT MAY DIRECT A SANCTION
8 APPLICATION, IN RELATION TO A SOLVENT COMPANY,
9 SHOULD BE SERVED UPON CREDITORS. YOU KNOW, IF YOU
10 READ THE WHOLE OF THE ACT AND THE WHOLE OF THE
11 RULES, YOU WILL SEE ALL THROUGH IT THERE IS A
12 DISTINCTION MADE BETWEEN SOLVENT COMPANIES AND
13 INSOLVENT COMPANIES. IN SOLVENT COMPANIES, IT IS
14 THE CONTRIBUTORIES WHO GET NOTICE, WHO HAVE THE
15 RIGHT TO BE HEARD, WHO CAN MAKE APPLICATIONS, WHO
16 CAN SIT ON THE LIQUIDATION COMMITTEE AND SO FORTH.
17 IN INSOLVENT COMPANIES, IT IS THE CREDITORS. IN
18 COMPANIES THAT ARE OF DOUBTFUL SOLVENCY, IT IS
19 BOTH. SO I WOULD READ 2(3)(D) AS MEANING SUCH
20 OTHER CREDITORS IN THE CASE OF AN INSOLVENT
21 COMPANY OR CONTRIBUTORIES IN THE CASE OF A SOLVENT
22 COMPANY AS THE COURT MAY DIRECT.

23 Q. SO YOU ARE ACTUALLY SAYING RULE
24 3(4) GOVERNS RULE 2(1), WHICH IS WHERE WE STARTED,
25 AND YOU SAID IT WAS NOT?

1 A. I AM NOT SAYING IT IS BECAUSE OF
2 RULE 3(4). I AM JUST SAYING IT IS BECAUSE OF THE
3 WHOLE SCHEME OF THE ACT AND THE RULES. OBVIOUSLY
4 THE ACT TAKES PRECEDENCE OVER THE RULES.

5 Q. BUT WE SAW THAT THE ACT DOES NOT
6 SAY AND IT IS NOT REFERRING TO LIQUIDATOR'S
7 APPLICATIONS, RIGHT? I KNOW YOU DISAGREE WITH ME
8 ON THAT.

9 A. HMM.

10 Q. ASSUME I AM RIGHT, ON THAT BASIS,
11 WOULD YOU AGREE THAT THE COURT HAS GOT POWER --
12 JUST ON THAT ASSUMPTION, WHICH I KNOW YOU DO NOT
13 AGREE WITH, WOULD YOU ACCEPT THAT THE COURT CAN
14 DIRECT SERVICE ON A CREDITOR IN A SOLVENT
15 LIQUIDATION?

16 A. HANG ON, WHAT AM I ASSUMING? I AM
17 ASSUMING ----

18 Q. THAT SECTION 110 DOES NOT HAVE THE
19 EFFECT THAT YOU SAY IT HAS. YOU SAY SECTION 110
20 APPLIES TO LIQUIDATOR APPLICATIONS AND
21 CONTRIBUTORY APPLICATIONS.

22 A. YES.

23 Q. I SAY IT IS ONLY TALKING ABOUT
24 APPLICATIONS THAT COULD IN PRINCIPLE BE MADE BY A
25 CREDITOR AND A CONTRIBUTORY AND IT IS NOT TALKING

1 ABOUT APPLICATIONS THAT COULD BE BROUGHT BY THE
2 LIQUIDATOR HIMSELF?

3 A. SO YOU ARE TALKING ABOUT 110(4)(A),
4 CORRECT?

5 Q. YES.

6 A. SO I AM ASSUMING THAT 110(4)(A)
7 DOES NOT APPLY TO ----

8 Q. TO LIQUIDATORS.

9 A. ---- SANCTION APPLICATIONS MADE BY
10 THE LIQUIDATOR?

11 Q. CORRECT, YES. I KNOW YOU DISAGREE
12 WITH THAT.

13 A. OKAY.

14 Q. I ABSOLUTELY ACCEPT THAT. I JUST
15 WANT YOU TO ASSUME THAT FOR PRESENT PURPOSES.

16 A. OKAY. MAYBE WE ASSUME THAT 110(4)
17 DOES NOT EXIST, JUST IGNORE 110(4).

18 Q. IT HAS JUST BEEN REPEALED.

19 A. OKAY. SO, LEAVING ASIDE 110(4),
20 THAT IS JUST ONE OF MANY EXAMPLES THROUGHOUT THE
21 COMPANIES ACT AND THE RULES, AND I AM SURE YOU
22 HAVE BEEN THROUGH THEM WITH A FINE-TOOTH COMB, AS
23 I HAVE, WHERE THE DISTINCTION IS MADE BETWEEN THE
24 CREDITORS IN AN INSOLVENT LIQUIDATION AND THE
25 CONTRIBUTORIES ON A SOLVENT ONE.

1 Q. WE WILL BE COMING ON TO SOME OF
2 THOSE RULES.

3 A. YES.

4 Q. I REALLY JUST WANT TO STICK WITH
5 SANCTION APPLICATION FOR THE MOMENT ----

6 A. YES.

7 Q. ---- JUST TO KEEP THINGS CLEAR.

8 A. HMM.

9 Q. SO SECTION 110 DOES NOT EXIST?

10 A. OKAY. BUT IF SECTION 110 DOES NOT
11 ITSELF, THEN THERE ARE NO SANCTION APPLICATIONS AT
12 ALL. JUST SAY SECTION 110(4) DOES NOT EXIST.

13 Q. FINE. THAT IS FINE. I JUST DO NOT
14 WANT TO BE TOO CONTROVERSIAL ABOUT IT. THAT IS
15 FINE. IF YOU GO BACK TO ORDER 11 ----

16 A. YES.

17 Q. ---- WOULD YOU ACCEPT MY READING OF
18 ORDER 11, WHICH IS THAT THE COURT CAN DIRECT
19 SERVICE ON A CREDITOR IN A SOLVENT LIQUIDATION?

20 A. IF YOU WERE READING ORDER 11 RULE
21 2(3)(D) IN ISOLATION, WITHOUT REGARD TO THE REST
22 OF THE COMPANIES WINDING UP RULES AND THE
23 COMPANIES ACT, THEN I WOULD AGREE, BUT IF YOU ARE
24 READING IT IN CONTEXT, AND EVEN WITHOUT SECTION
25 110(4), YOU KNOW, THAT SECTION DID NOT EXIST, IF

1 YOU READ IT IN THE CONTEXT OF THE REMAINDER OF THE
2 RULES AND THE ACT AND THE CASE LAW, THEN IT IS
3 CLEAR THAT THERE IS A DISTINCTION BETWEEN THE
4 CREDITORS HAVING THE ECONOMIC INTEREST IN AN
5 INSOLVENT WINDING UP AND THE CONTRIBUTORIES HAVING
6 THE ECONOMIC INTEREST IN A SOLVENT WINDING UP. SO
7 I WOULD SAY EVEN IF WE DID NOT HAVE SECTION
8 110(4), YOU WOULD HAVE TO READ ORDER 11, RULE
9 (2)(3)(D) IN THAT CONTEXT.

10 Q. DOES THAT BRING US ONTO THIS
11 DISTINCTION BETWEEN STANDING AND WEIGHT THAT YOU
12 SORT OF RAISED EARLIER, THAT YOU RAISED IN THE
13 CONTEXT OF REMOVAL APPLICATIONS UNDER SECTION 107?

14 A. YES.

15 Q. YOU ACCEPTED THAT EVEN IN A SOLVENT
16 LIQUIDATION THE CREDITOR HAS GOT STANDING.

17 A. HMM.

18 Q. BUT YOU SAID, WELL, THE COURT WOULD
19 NOT GIVE THE CREDITORS' VIEW MUCH WEIGHT, RIGHT?

20 A. YES.

21 Q. YOU WOULD ACCEPT THAT STANDING AND
22 WEIGHT ARE DIFFERENT THINGS?

23 A. YES.

24 Q. I THINK THAT IS WHAT I WANT TO KNOW
25 IN TERMS OF SECTION 110 WHATEVER, SUB-RULE (4),

1 DOES NOT EXIST.

2 A. OKAY.

3 Q. ARE YOU SAYING THAT A CREDITOR
4 WOULD NEVER HAVE STANDING TO PARTICIPATE IN A
5 LIQUIDATOR'S SANCTION APPLICATION OR ARE YOU
6 SAYING, WELL, ACTUALLY WHEN YOU LOOK AT THE ACT AS
7 A WHOLE, YOU LOOK AT THE CASE LAW AND THE COURT
8 WOULD GIVE THE CREDITOR'S VIEW VERY LITTLE WEIGHT?

9 A. WELL, I THINK THE ACTUAL POSITION,
10 GIVEN SUB-RULE (4), IS THAT THEY DO NOT HAVE
11 STANDING, BUT POSSIBLY IF WE TAKE THAT SECTION
12 AWAY ----

13 Q. THAT IS WHERE IT IS CONTROVERSIAL,
14 BECAUSE WE DO NOT AGREE WITH YOUR INTERPRETATION.

15 A. YES, WE DO NOT AGREE. OKAY, PUT
16 THAT TO ONE SIDE. POSSIBLY YOU ARE INTO THE KIND
17 OF STANDING -- YOU KNOW, POSSIBLY YOU WOULD GET
18 INTO THE SITUATION THAT WE HAVE GOT IN A REMOVAL
19 APPLICATION WHERE THEY TECHNICALLY HAVE STANDING.
20 TECHNICALLY HERE, YOU KNOW, THE JUDGE COULD DIRECT
21 THEM TO BE SERVED, BUT THEN WHAT IS THE POINT OF
22 SERVING THEM WHEN THEIR VIEWS ARE NOT GIVEN ANY
23 WEIGHT.

24 Q. WELL, THIS BRINGS US BACK TO AN
25 EARLIER ANSWER YOU GAVE, WHICH WAS IN THE

1 SITUATION THAT I POSITED TO YOU WHERE THE JUDGE
2 WAS A LITTLE BIT CONCERNED THAT THERE MIGHT BE A
3 RISK TO THE CREDITORS AND I SAID HE HAS ALL THESE
4 OPTIONS. YOU SAID WHAT HE CAN DO IS JUST DIRECT
5 THE LIQUIDATOR TO CHANGE THE DETERMINATION.

6 A. HMM.

7 Q. ACTUALLY, THE EASIEST THING TO DO,
8 IF HE HAS THE POWER TO DO IT, IS JUST DIRECT THE
9 LIQUIDATOR TO SERVE THE CREDITOR, IS IT NOT?

10 A. WELL, NOT REALLY BECAUSE HE IS ONLY
11 GOING TO DIRECT THE LIQUIDATOR TO SERVE THE
12 CREDITORS IF HE WANTS TO HEAR FROM THE CREDITORS.
13 IF THE COMPANY HAS BEEN DETERMINED TO BE SOLVENT,
14 THEN THE CREDITORS' VIEWS ARE NOT GIVEN ANY
15 WEIGHT. IF I WAS THE JUDGE, I WOULD RATHER
16 I THINK HAVE -- THEN THE JUDGE IS GETTING HIMSELF
17 INTO A VERY DIFFICULT POSITION WHERE HE IS TAKING
18 INTO ACCOUNT THE VIEWS OF A CREDITOR IN A SOLVENT
19 WINDING UP WHICH GOES CONTRARY TO THE WHOLE SCHEME
20 AND ALL THE AUTHORITY IN CAYMAN AND ELSEWHERE.
21 WHY NOT JUST SAY TO THE LIQUIDATOR, LOOK, YOU
22 KNOW, THIS SOLVENCY SITUATION HERE IS NOT AS CLEAR
23 CUT AS MAYBE IT APPEARED WHEN YOU FIRST DID YOUR
24 SOLVENCY DETERMINATION. FILE A NEW CERTIFICATE
25 AND LET US BRING THE CREDITORS IN.

1 Q. RIGHT. I THINK WE MIGHT BE GOING
2 AROUND IN CIRCLES HERE, BECAUSE I THINK THERE ARE
3 CERTAIN HYPOTHESIS THAT WERE BUILT INTO YOUR
4 EARLIER ANSWERS THAT HAVE BEEN LOST IN THE
5 SUBSEQUENT ANSWER. I THINK YOU AGREED THAT THE
6 COURT WOULD NOT SANCTION THE EXERCISE OF A POWER
7 THAT MIGHT BE PUT THE INTEREST OF CREDITORS AT
8 RISK?

9 A. YES.

10 Q. SO, YOUR LIQUIDATOR TURNS UP AND HE
11 SAYS, WELL, YOU KNOW, BALANCE SHEET SOLVENT. THIS
12 IS WHAT I WANT TO DO. THE JUDGE SAYS, WELL, THAT
13 KIND OF SOUNDS FINE, BUT I AM JUST A LITTLE BIT
14 WORRIED ABOUT THE CREDITORS' INTEREST. THAT WAS
15 THE SITUATION THAT WE WERE DEALING WITH, RIGHT?
16 I SUGGESTED TO YOU THAT HE HAD THREE OPTIONS:
17 REFUSE SANCTION; TELL THE LIQUIDATOR THAT HE
18 WANTED ADVERSARIAL ARGUMENT, AND SO MAKE THE
19 LIQUIDATOR BE THE VOICE OF THE CREDITOR AND MAKE
20 THE SHAREHOLDERS TURN UP BY YOURSELF OR LEARNED
21 CAYMAN COUNSEL, OR HE COULD ACTUALLY DIRECT THAT
22 THE LIQUIDATORS GIVE NOTICE OF THE APPLICATION TO
23 A CREDITOR AND THEY COULD TURN UP. IF THEY WANTED
24 TO, OF COURSE ONCE THEY HAVE HAD NOTICE AND THEY
25 DO NOT TURN UP, THEN THAT IS THE END OF IT, BUT

1 THEY COULD TURN UP IF THEY WANTED TO. I POSITED
2 THOSE THREE SITUATIONS AND YOU SAID NO, THE
3 SIMPLEST THING TO DO WOULD BE TO DIRECT THE
4 LIQUIDATOR TO CHANGE THE DETERMINATION OF
5 SOLVENCY. SO I JUST DO NOT UNDERSTAND WHY YOU SAY
6 THAT IS SIMPLER THAN SIMPLY JUST DIRECTING, FOR
7 EXAMPLE, THE LIQUIDATOR TO GIVE NOTICE TO THE
8 CREDITORS?

9 A. I THINK IT IS SIMPLER BECAUSE IF HE
10 WANTS TO TAKE INTO ACCOUNT THEIR INTERESTS AND THE
11 COMPANY IS STILL SOLVENT, THEN, YOU KNOW, THAT IS
12 CONTRARY TO THE SCHEME AND THE CASE LAW AND THE
13 WHOLE WEIGHT OF CAYMAN AND ENGLISH INSOLVENCY LAW,
14 WHEREAS IF IT IS OF DOUBTFUL SOLVENCY, THEN, YOU
15 KNOW, HE IS ABSOLUTELY RIGHT TO TAKE ACCOUNT OF
16 THE CREDITORS.

17 Q. RIGHT. I THINK I AM GOING TO MOVE
18 ON. I AM JUST GOING TO FINISH BY SUGGESTING TO
19 YOU THAT WHERE A COMPANY IS BALANCE SHEET SOLVENT,
20 THE COURT WILL NOT SANCTION AN EXERCISE OF POWER
21 THAT MIGHT PUT THE CREDITORS' INTEREST AT RISK,
22 AND I THINK YOU AGREE WITH THAT?

23 A. YES.

24 Q. AND IN THAT SITUATION IT WILL
25 EITHER REFUSE SANCTION OR ASK TO HEAR ADVERSARIAL

1 ARGUMENT ON THE POINT OR, ALTERNATIVELY, IT WILL
2 DIRECT THAT THE CREDITORS ARE SERVED. THOSE ARE
3 THE ONLY THREE THINGS THAT THE COURT WOULD DO IN
4 THAT SITUATION?

5 A. NO, I DO NOT AGREE WITH THAT.

6 Q. YOU MENTIONED REPORTING.

7 A. MMM-HMM.

8 Q. IN A SOLVENT LIQUIDATION, THE
9 LIQUIDATORS ARE REQUIRED TO REPORT TO THE
10 CONTRIBUTORIES?

11 A. YES.

12 Q. RIGHT. NOW, CREDITORS IN A SOLVENT
13 LIQUIDATION ARE ENTITLED TO OBTAIN COPIES OF ALL
14 THE REPORTS AND ALL THE DOCUMENTS FILED BY THE
15 OFFICIAL LIQUIDATOR AT COURT, ARE THEY NOT?

16 A. THEY ARE ENTITLED TO ACCESS THE
17 COURT FILE, YES.

18 Q. YES. AND JUST BECAUSE THE OFFICIAL
19 LIQUIDATOR IS NOT OBLIGED OR REQUIRED TO REPORT TO
20 THE CREDITORS DOES NOT MEAN THAT HE WILL NOT DO
21 SO, DOES IT?

22 A. WELL, I THINK IT DOES MEAN THAT HE
23 WILL NOT DO SO.

24 Q. HE IS JUST TOLD HE DOES NOT HAVE
25 TO, BUT IF HE THOUGHT THAT THERE WAS SOMETHING

1 IMPORTANT TO COMMUNICATE TO THE CREDITORS, SUCH AS
2 THE DATE ON WHICH THEY MIGHT GET PAYMENT OR HOW HE
3 WOULD LIKE THEM TO PROVE, AND I MEAN THAT IN A
4 NON-TECHNICAL SENSE, THEIR DEBTS, HE MIGHT WANT TO
5 REPORT TO THEM IN COMMUNICATION AND GIVE THEM AN
6 UPDATE ON THE LIQUIDATION, MIGHT HE NOT?

7 A. I MEAN, HE MIGHT, BUT MY EXPERIENCE
8 OF ACTING FOR LIQUIDATORS IS THAT THEY ARE QUITE
9 CAUTIOUS IN TERMS OF WHO THEY SHARE INFORMATION
10 WITH. SO THEY ARE ALWAYS ASTUTE OBVIOUSLY TO
11 FOLLOW THE RULES AND THE ACT AND COMPLY WITH THEIR
12 REPORTING OBLIGATIONS AS SET OUT IN THE ACT, BUT
13 THEY ARE NOT GOING TO GO BEYOND THAT, BECAUSE IF
14 THEY GO BEYOND THAT THEY MAY BREACH CAYMAN'S
15 CONFIDENTIALITY LAWS AND DATA PROTECTION LAWS, AND
16 THINGS OF THAT NATURE. SO ----

17 Q. SORRY.

18 A. SO, YES, IN MY EXPERIENCE I WOULD
19 BE SURPRISED TO FIND A LIQUIDATOR GOING BEYOND HIS
20 STATUTORY REPORTING OBLIGATIONS.

21 Q. PART OF THE LIQUIDATOR'S STATUTORY
22 REPORTING OBLIGATIONS IS TO REPORT TO THE COURT,
23 IS IT NOT?

24 A. YES.

25 Q. SO THAT REPORT WOULD BE FILED AT

1 COURT, WILL IT NOT?

2 A. YES.

3 Q. SO THERE IS NO REASON WHY THE
4 LIQUIDATOR WOULD NOT SEND THAT TO CREDITORS IF HE
5 THOUGHT THAT MIGHT ASSIST, IS THERE?

6 A. WELL, THE REPORTS ARE OFTEN SEALED,
7 SO HE OBVIOUSLY WILL NOT BE SENDING ANYTHING THAT
8 IS SEALED. IF IT IS ON THE COURT FILE AND THE
9 CREDITOR HAS ACCESS TO THE COURT FILE, THEN, YOU
10 KNOW, POSSIBLY HE COULD. YOU KNOW, IF YOU HAVE
11 GOT A SOLVENT LIQUIDATION, THE CREDITORS ARE MEANT
12 TO BE GETTING PAID IN THE ORDINARY COURSE, SO THEY
13 SHOULD NOT HAVE NEED TO GET COPIES OF THE
14 LIQUIDATOR'S REPORTS BECAUSE THEY ARE JUST GETTING
15 PAID. IT IS ----

16 Q. NOT IF THEIR DEBTS ARE DISPUTED,
17 THOUGH?

18 A. THAT IS TRUE, BUT, YOU KNOW, LIKE
19 ANY COMPANY IN LITIGATION OVER A DEBT IS NOT GOING
20 TO BE SENDING ITS INFORMATION TO THE COUNTER-PARTY
21 TO THE DISPUTE. A COMPANY IN SOLVENT LIQUIDATION
22 VIS-À-VIS A CREDITOR IS IN THE SAME POSITION.

23 Q. A COMPANY IN SOLVENT LIQUIDATION IS
24 STILL A CLASS REMEDY, YOU WOULD ACCEPT THAT, WOULD
25 YOU?

1 A. IT IS A CLASS REMEDY FOR THE
2 BENEFIT OF THE SHAREHOLDERS.

3 Q. ONLY BECAUSE THE ASSUMPTION IS THAT
4 THE CREDITORS ARE GOING TO BE PAID OUT IN FULL
5 WITH INTEREST?

6 A. YES.

7 Q. SO IT IS NOT A CLASS REMEDY FOR THE
8 BENEFIT OF THE SHAREHOLDERS BECAUSE SOMEHOW IN A
9 SOLVENT LIQUIDATION THE CREDITORS' INTEREST ARE
10 SUBORDINATED TO THOSE OF THE SHAREHOLDERS. THAT
11 IS NOT WHAT YOU ARE SAYING?

12 A. NO.

13 Q. UNLESS AND UNTIL A CREDITOR,
14 WHETHER HIS CLAIM IS DISPUTED OR NOT, IS PAID, HE
15 IS STILL A CREDITOR OF THE COMPANY AND HIS
16 INTERESTS TRUMP THOSE OF THE SHAREHOLDER, DO THEY
17 NOT?

18 A. YES.

19 Q. AND OF COURSE A CREDITOR WHO HAS
20 NOT BEEN PAID, WHETHER IT IS DISPUTED OR NOT, WILL
21 WANT TO KNOW WHAT IS ACTUALLY HAPPENING IN THE
22 LIQUIDATION, WILL HE NOT?

23 A. HE MAY WELL.

24 Q. YES. AND A LIQUIDATOR ACTING
25 NEUTRALLY MAY WELL FIND THAT IT IS APPROPRIATE NOT

1 TO JUST REPORT TO THE CONTRIBUTORS BUT ALSO SEND
2 EVEN IF IT IS JUST A COPY OF THE SAME REPORT TO
3 THE EXTANT CREDITORS TO KEEP THEM UP-TO-DATE?

4 A. WELL, HE MAY. YOU KNOW, HE MAY,
5 BUT HE MAY NOT. IT IS A FACT SPECIFIC
6 DETERMINATION, SO I AM NOT SURE I CAN KIND OF
7 HYPOTHETICALLY SAY ----

8 Q. I JUST WANT TO SAY IN PRINCIPLE.

9 A. IN PRINCIPLE HE MAY.

10 Q. IN PRINCIPLE HE MAY. IN FACT THE
11 COURT MAY ALSO DIRECT HIM TO COMMUNICATE WITH THE
12 CREDITORS IN RELATION TO THE PROGRESS OF THE
13 LIQUIDATION, SOLVENT OR NOT, MAY IT NOT?

14 A. I THINK THIS GETS BACK TO THE POINT
15 THAT WE HAVE ALREADY DISCUSSED IN RELATION TO
16 SANCTION APPLICATIONS, BUT I THINK IT IS UNLIKELY
17 THAT YOU WOULD HAVE A SITUATION WHERE YOU HAVE A
18 SOLVENT LIQUIDATION AND THE COURT WOULD SAY, OH,
19 BUT IN ADDITION TO YOUR OBLIGATIONS UNDER ORDER 8
20 TO REPORT TO SHAREHOLDERS, I WANT YOU TO START
21 SENDING YOUR REPORT TO THE CREDITORS AS WELL.
22 I THINK IF YOU HAVE GOT TO THAT STAGE, THEN
23 I THINK THE MORE LIKELY THING FOR THE JUDGE TO DO
24 IS TO DIRECT THE LIQUIDATOR TO CHANGE THE SOLVENCY
25 DETERMINATION OR EVEN MORE LIKELY THAN THAT THE

1 LIQUIDATOR WOULD DO IT HIMSELF OR HERSELF WITHOUT
2 NEEDING THE JUDGE TO TELL HIM OR HER TO DO IT.

3 Q. I THINK WHAT YOU ARE SAYING IS THAT
4 THE SORT OF FACTUAL HYPOTHESIS THAT I AM WORKING
5 WITH IS FARFETCHED AND THAT CREDITORS' INTEREST
6 ARE JUST SIMPLY NEVER REALLY GOING TO BE AT RISK
7 EVEN IN A SOLVENT LIQUIDATION. IS THAT WHAT YOU
8 ARE SAYING?

9 A. YES, YES.

10 Q. AND THAT IS BECAUSE YOU WILL ONLY
11 HAVE SOMETHING THAT IS TRULY A SOLVENT LIQUIDATION
12 WHERE THE -- I THINK YOU ARE BASICALLY SAYING IT
13 IS GUARANTEED OR ALMOST GUARANTEED THAT THE
14 CREDITORS ARE GOING TO BE PAID IN FULL WITH ALL
15 THE STATUTORY INTEREST THAT THEY ARE ENTITLED TO?

16 A. YES.

17 Q. BUT IF THERE WAS EVER A RISK,
18 HOWEVER SMALL, THE COURT OR THE LIQUIDATOR WOULD
19 ENSURE THAT THEY DID NOT DO ANYTHING TO HARM THE
20 CREDITORS' INTEREST UNTIL THOSE CREDITORS HAD BEEN
21 PAID IN FULL?

22 MR. MORRIS: OBJECTION. ASKED AND
23 ANSWERED MANY TIMES.

24 A. YES.

25 BY MISS LEAHY:

1 Q. IN YOUR DECLARATION, YOU CAN TURN
2 IT UP IF YOU LIKE, IF YOU GO TO PAGE 21, PARAGRAPH
3 72, CAN YOU JUST REMIND YOURSELF OF THE CONTENT?
4 (PAUSE)

5 A. YES.

6 Q. YOU SAY, "MR. ROBINSON DOES NOT
7 EXPLAIN THAT THE CREDITORS OF ASCENTRA ARE IN FACT
8 BARRED AS A MATTER OF LAW FROM PARTICIPATING IN
9 THE WINDING UP."

10 A. YES.

11 Q. WE HAVE ALREADY ESTABLISHED THAT
12 CREDITORS OF A SOLVENT LIQUIDATION GET NOTICE OF
13 THE LIQUIDATION, RIGHT?

14 A. YES.

15 Q. AND WE HAVE ALREADY ESTABLISHED, AS
16 YOUR COUNSEL HAS POINTED OUT, THAT IN A SOLVENT
17 LIQUIDATION NEITHER THE COURT NOR THE LIQUIDATOR
18 WILL DO ANYTHING TO HARM THE INTEREST OF THE
19 CREDITORS, RIGHT?

20 A. YES.

21 Q. AND WE HAVE ALSO ESTABLISHED THAT A
22 CREDITOR IN A SOLVENT LIQUIDATION HAS STANDING TO
23 MAKE A REMOVAL APPLICATION?

24 A. ALTHOUGH ITS VIEWS WILL BE GIVEN
25 LITTLE TO NO WEIGHT.

1 Q. IT IS GOT STANDING TO MAKE A
2 REMOVAL APPLICATION?

3 A. YES.

4 Q. SO YOU ARE ACTUALLY WRONG TO SAY
5 THAT THE CREDITORS ARE BARRED FROM PARTICIPATION
6 IN THE WINDING UP, ARE YOU NOT, BECAUSE THAT
7 SUGGESTS THAT THERE IS JUST SIMPLY NO -- THEY HAVE
8 NO ABILITY TO PARTICIPATE AT ALL IN THE WINDING UP
9 PROCESS. BUT THAT IS NOT QUITE RIGHT, IS IT?

10 A. WELL, I THINK THE ONLY ABILITY THAT
11 YOU HAVE POINTED OUT AFTER THE COMPANY GOES INTO
12 LIQUIDATION IS THE ABILITY IN SECTION 107 TO BRING
13 A REMOVAL APPLICATION, BUT THEN, YOU KNOW, THAT IS
14 ONE OF THOSE CASES WHERE, OKAY, TECHNICALLY THEY
15 MIGHT BE ABLE TO DO IT BUT THE COURT IS NOT GOING
16 TO GIVE THEIR VIEWS ANY WEIGHT. I MEAN, IF YOU
17 CALL THAT PARTICIPATING, IF YOU CALL THE RIGHT TO
18 BRING A REMOVAL APPLICATION ON WHICH THE COURT IS
19 NOT GOING TO GIVE YOUR VIEWS ANY WEIGHT, A RIGHT
20 TO PARTICIPATE IN THE WINDING UP, THEN, YES,
21 I AGREE WITH YOU, BUT I DO NOT THINK THAT IS
22 REALLY WHAT YOU MEAN BY -- WHAT ONE WOULD MEAN BY
23 PARTICIPATING IN THE WINDING UP. IT IS CERTAINLY
24 NOT WHAT I MEANT. PARTICIPATING IN THE WINDING UP
25 IS RECEIVING THE LIQUIDATOR'S REPORTS, IT IS

1 SITTING ON THE LIQUIDATION COMMITTEE, IT IS BEING
2 HEARD ON SANCTION APPLICATIONS AND GETTING NOTICE
3 OF THOSE APPLICATIONS.

4 Q. WHAT ABOUT BEING ABLE TO APPEAL TO
5 THE COURT A REJECTION OF YOUR PROOF OF DEBT?

6 A. WELL, I MEAN, YOU ARE ONLY ENTITLED
7 TO SUBMIT A PROOF OF DEBT IF THE LIQUIDATOR
8 INVITES YOU TO SUBMIT ONE, WHICH HE IS ONLY ABLE
9 TO DO IN THE LIMITED CIRCUMSTANCES SET OUT IN
10 ORDER 16, RULE 1(3), WHICH IS WHERE THERE IS A
11 DOUBT OR DISPUTE ABOUT THE EXISTENCE OF THE DEBT
12 OR THE AMOUNT OWING. SO, THE VAST MAJORITY OF
13 CREDITORS IN A SOLVENT LIQUIDATION WOULD NOT GET
14 ANYWHERE NEAR THE PROOF OF DEBT PROCEDURE BECAUSE
15 THEY ARE JUST PAID IN THE ORDINARY COURSE.

16 Q. YES. I MEAN, IF THE DEBT IS
17 ADMITTED IN FULL AND IT IS PAID IN FULL, THEY DO
18 NOT NEED TO PARTICIPATE IN THE WINDING UP, DO
19 THEY?

20 A. NO.

21 Q. SO THE ONLY PEOPLE WHO MIGHT WANT
22 TO PARTICIPATE IN THE WINDING UP ARE THOSE WHO
23 DEBTS ARE DISPUTED, RIGHT, OR WHO HAVE NOT BEEN
24 PAID? THEY ARE THE PEOPLE WHO WOULD WANT TO
25 PARTICIPATE, RIGHT?

1 A. YES, THE PEOPLE WHO HAVE NOT BEEN
2 PAID, YES.

3 Q. YES. AND THEY CAN PARTICIPATE, CAN
4 THEY NOT, BECAUSE NOT ONLY HAVE WE GOT REMOVAL, WE
5 ALSO GOT THE PROOF OF DEBT PROCEDURE. WE HAVE
6 ALSO GOT SECTION 97 AND ----

7 A. REMOVAL WE ALREADY TALKED ABOUT.
8 THE PROOF OF DEBT PROCEDURE ONLY KICKS IN IF THE
9 LIQUIDATOR INVITES THEM TO SUBMIT A PROOF OF DEBT,
10 SO, YOU KNOW, THAT REQUIRES A STEP BY THE
11 LIQUIDATOR FIRST.

12 Q. PAUSING JUST THERE, HE WILL REQUIRE
13 A PROOF OF DEBT IF THE DEBT IS DISPUTED, WILL HE
14 NOT?

15 A. HE CAN. HE DOES NOT HAVE TO, BUT
16 HE CAN.

17 Q. WHAT WOULD HE DO THEN? WHAT ELSE
18 WOULD HE DO IF HE DISPUTES THE DEBT?

19 A. HE COULD LET THE CREDITOR -- HE
20 COULD JUST NOT PAY IT AND LET THE CREDITOR APPLY
21 FOR A LIFTING OF THE STAY AND SUE THE COMPANY.

22 Q. YES, AND THEN THE CREDITOR HAS
23 ACCESS TO COURT. SO IT IS PARTICIPATING IN THE
24 LIQUIDATION, IS IT NOT?

25 A. NO, BECAUSE THAT WOULD BE A

1 SEPARATE ACTION OUTSIDE OF THE LIQUIDATION. THAT
2 WOULD NOT BE PART OF THE LIQUIDATION AT ALL.

3 Q. SECTION 97 IS NOT A SEPARATE
4 APPLICATION OUTSIDE THE LIQUIDATION. IT IS AN
5 APPLICATION IN THE LIQUIDATION, IS IT NOT?

6 A. YES, OKAY, THE SECTION 97
7 APPLICATION WOULD BE TO LIFT THE STAY -----

8 Q. YES.

9 A. ----- THAT IS IMPOSED AS A RESULT,
10 BUT THE POINT OF THAT APPLICATION WOULD BE TO
11 BRING A SEPARATE CLAIM THAT WOULD BE HEARD OUTSIDE
12 THE LIQUIDATION.

13 Q. CAN I ASK YOU WHY YOU HAVE
14 SUGGESTED THAT MR. ROBINSON OUGHT TO HAVE BROUGHT
15 TO THE ATTENTION OF THE US COURT THE FACT THAT YOU
16 SAY CREDITORS ARE BARRED FROM PARTICIPATING IN THE
17 WINDING UP? WHY DO YOU THINK IT WAS IMPORTANT
18 THAT HE BROUGHT THAT PARTICULAR, YOU SAY IS A FACT
19 OF CAYMAN LAW, TO THE ATTENTION OF THE NEW YORK
20 COURT?

21 A. I THINK THE PARAGRAPHS THAT I HAVE
22 IDENTIFIED AT PARAGRAPHS 72 AND 73 AND 74 AS WELL
23 ARE MISLEADING. SHALL WE TAKE THEM ONE BY ONE?

24 Q. IF YOU COULD JUST SUMMARISE WHY
25 THEY ARE MISLEADING? PARTICULARLY, I AM MUCH MORE

1 INTERESTED AT THE MOMENT IN TRYING TO CONCENTRATE
2 ON THE PARAGRAPH WE WERE JUST LOOKING AT. DO YOU
3 SAY THAT PARAGRAPH ON ITS OWN IS MISLEADING OR IS
4 IT THE COMBINED EFFECT OF VARIOUS PARAGRAPHS OF
5 MR. ROBINSON'S DECLARATION THAT YOU SAY ARE
6 MISLEADING?

7 A. DO YOU HAVE A COPY OF
8 MR. ROBINSON'S DECLARATION?

9 Q. WE DO. WE CAN PUT IT IN AS AN
10 EXHIBIT. CAN I CHECK, DID YOU DRAFT THAT SECTION
11 OF YOUR REPORT, SAYING THAT MR. ROBINSON'S
12 DECLARATION WAS MISLEADING, OR WAS THE FIRST DRAFT
13 PREPARED BY THE BARRISTER AT WILBERFORCE CHAMBERS?

14 A. THE FIRST DRAFT OF THE WHOLE THING
15 WAS PREPARED BY GRAEME HALKERSTON, BUT I WENT
16 THROUGH IT VERY CAREFULLY MYSELF AND SATISFIED
17 MYSELF OF IT OBVIOUSLY BEFORE SIGNING IT.

18 Q. YOU ARE NOT ALLEGING, ARE YOU, THAT
19 MR. ROBINSON DELIBERATELY SOUGHT TO MISLEAD THE US
20 COURT, ARE YOU?

21 A. NO, OF COURSE NOT.

22 Q. THIS IS EXHIBIT 4.

23 (EXHIBIT 4 MARKED FOR IDENTIFICATION)

24 A. THANK YOU. OKAY, AT PARAGRAPH 72
25 WE ARE REFERRING TO PARAGRAPH 27 OF MR. ROBINSON'S

1 DECLARATION. I THINK WHAT IS MISLEADING THERE IS
2 THE STATEMENT THAT "ALL MAJOR STAKEHOLDERS ARE
3 ACTIVELY PARTICIPATING IN THE CAYMAN PROCEEDING",
4 BECAUSE I THINK IN THE ORDINARY READING OF THE
5 WORD "STAKEHOLDERS", CERTAINLY AS A CAYMAN
6 INSOLVENCY LAWYER, AND I WOULD SURMISE THE SAME
7 FOR THE US BANKRUPTCY COURT, YOU WOULD READ
8 STAKEHOLDERS AS MEANING CREDITORS AND
9 SHAREHOLDERS. IN FACT CREDITORS ARE NOT
10 PARTICIPATING IN THE CAYMAN PROCEEDING.

11 Q. OKAY. JUST PAUSING THERE ----

12 A. YES.

13 Q. ---- THE FIRST QUESTION IS, DO YOU
14 KNOW WHETHER ANY CREDITORS HAVE SUBMITTED PROOF,
15 FORMAL OR INFORMAL, IN THE LIQUIDATION OF
16 ASCENTRA?

17 A. NO, I DO NOT.

18 Q. SO YOU DO NOT KNOW FOR A FACT THAT
19 CREDITORS ARE NOT PARTICIPATING IN THE LIQUIDATION
20 OF ASCENTRA, DO YOU?

21 A. NO.

22 Q. RIGHT. THEN IN TERMS OF MAJOR
23 STAKEHOLDERS, ARE YOU AWARE OF WHAT THE SIZE OF
24 THE CREDITOR BODY IS?

25 A. NO.

1 Q. NO. SO YOU DO NOT KNOW WHETHER ANY
2 CREDITORS COULD BE CONSIDERED MAJOR STAKEHOLDERS
3 OF ASCENTRA, DO YOU?

4 A. NO.

5 Q. SO HOW CAN YOU SAY THAT
6 MR. ROBINSON'S STATEMENT IS MISLEADING?

7 A. WELL, BECAUSE I AM FAMILIAR WITH
8 THE CAYMAN PROCESS AND I KNOW THAT CREDITORS ARE
9 NOT ABLE TO ACTIVELY PARTICIPATE IN THE SOLVENT
10 LIQUIDATION OF A CAYMAN ISLANDS COMPANY.

11 Q. BUT YOU JUST TOLD ME YOU DID NOT
12 KNOW WHETHER ANY CREDITORS WERE MAJOR
13 STAKEHOLDERS?

14 A. THAT IS TRUE. OKAY, SO IF MAJOR
15 STAKEHOLDERS -- IF ALL THE STAKEHOLDERS ARE
16 SHAREHOLDERS, AND THERE ARE NO ----

17 Q. I DID NOT SAY THAT.

18 A. OKAY.

19 Q. I SAID YOU DO NOT KNOW. THERE IS
20 NO EVIDENCE AS TO WHETHER THERE ARE ANY CREDITORS
21 THAT WOULD CONSTITUTE A MAJOR STAKEHOLDER.

22 A. I AM NOT FAMILIAR WITH THE FACTS OF
23 THE CASE AND THE CONSTITUENTS IN THE LIQUIDATION,
24 THAT IS RIGHT.

25 Q. AND WOULD YOU ACCEPT THAT UNLESS

1 YOU KNEW THAT THERE WERE CREDITORS WHO WERE OWED
2 SUBSTANTIAL SUMS OF MONEY, VERY SUBSTANTIAL SUMS
3 OF MONEY, THEN YOU SHOULD NOT BE SUGGESTING THAT
4 MR. ROBINSON'S STATEMENT IS MISLEADING WHEN HE
5 REFERS TO MAJOR STAKEHOLDERS?

6 MR. MORRIS: OBJECTION TO THE FORM
7 OF THE QUESTION.

8 MR. MCDONALD: I AM SORRY, JUST
9 READ THAT AGAIN. HE OBJECTED WHILE YOU WERE
10 SPEAKING. IF YOU COULD HOLD YOUR OBJECTION UNTIL
11 SHE FINISHES HER QUESTION, THAT WOULD BE HELP.

12 MR. MORRIS: SUPER.

13 MR. MCDONALD: OKAY? THANK YOU.

14 BY MISS LEAHY:

15 Q. DO YOU ACCEPT THAT UNLESS YOU HAD
16 KNOWLEDGE OF THE FACT THAT THERE WERE CREDITORS
17 WHO WERE OWED SUBSTANTIAL SUMS OF MONEY BY THE
18 COMPANY THEN YOU SHOULD NOT BE SUGGESTING IN YOUR
19 DECLARATION THAT MR. ROBINSON'S STATEMENT IS
20 MISLEADING WHEN HE REFERS TO MAJOR STAKEHOLDERS?

21 MR. MORRIS: OBJECTION TO THE FORM
22 OF THE QUESTION.

23 A. WELL, I STILL THINK TO ME THE WORD
24 "STAKEHOLDERS" CARRIES THE CONNOTATION OF
25 CREDITORS AND SHAREHOLDERS. IF IT WERE THE CASE

1 THAT THERE WERE NO CREDITORS AND IT WAS ONLY
2 SHAREHOLDERS THAT HAD AN INTEREST IN THIS COMPANY,
3 WHY WOULD YOU NOT JUST SAY ALL THE SHAREHOLDERS
4 ARE ACTIVELY PARTICIPATING?

5 BY MISS LEAHY:

6 Q. CAN WE LOOK AT THE DECLARATION THAT
7 YOU MADE IN TCA GLOBAL?

8 A. OKAY.

9 Q. DO YOU RECALL THAT?

10 A. WHICH ONE? CAN I SEE A COPY OF IT?

11 Q. YES, WE WILL SHOW IT TO YOU. I DID
12 NOT KNOW YOU HAD MADE MANY. I HAVE ONLY SEEN ONE.

13 A. I HAVE MADE TWO.

14 Q. YOU HAVE MADE TWO. THIS IS EXHIBIT
15 5.

16 ([EXHIBIT 5](#) MARKED FOR IDENTIFICATION)

17 A. THANK YOU.

18 Q. DOES THIS LOOK FAMILIAR?

19 A. YES.

20 Q. MY UNDERSTANDING IS THIS WAS AN
21 INSOLVENT LIQUIDATION, NOT A SOLVENT LIQUIDATION.

22 A. IT IS OF DOUBTFUL SOLVENCY.

23 Q. DOUBTFUL SOLVENCY?

24 A. YES.

25 Q. OKAY. WHERE DOES YOUR DECLARATION

1 STATE THAT IT IS OF DOUBTFUL SOLVENCY?

2 A. I WILL NEED TO READ THIS. THIS IS
3 SOMETHING THAT I SIGNED TWO AND A HALF YEARS AGO.
4 DO YOU WANT ME TO READ IT?

5 Q. NO, FAIR ENOUGH. I JUST DID NOT
6 SEE A REFERENCE TO THAT. DO YOU RECALL WHETHER
7 ULTIMATELY IT WAS SOLVENT OR INSOLVENT AT THE END
8 OF THE ----

9 A. IT IS STILL GOING ON.

10 Q. IT IS STILL GOING ON. THEY HAVE
11 NOT MADE ANOTHER DETERMINATION?

12 A. NO.

13 Q. AND THE DETERMINATION, THE FORMAL
14 DETERMINATION WAS DOUBTFUL?

15 A. YES.

16 Q. DID IT CHANGE AT ANY POINT?

17 A. NO.

18 Q. I AM GOING TO HAVE TO COME BACK TO
19 THAT BECAUSE I HAVE LOST MY REFERENCE.

20 A. OKAY.

21 Q. I WILL COME BACK TO THAT IN A
22 MOMENT. CAN WE TAKE ANOTHER FIVE-MINUTE BREAK,
23 BECAUSE I JUST WANT TO FIND MY REFERENCE RATHER
24 THAN GOING OUT ----

25 A. SURE.

1 MR. MORRIS: SURE.

2 MISS LEAHY: LET US SAY 10 MINUTES,
3 BECAUSE BY THE TIME WE ALL GET OUT OF THE ROOM AND
4 GET BACK IN, WE NEED TO TAKE THAT.

5 A. SURE.

6 THE COURT REPORTER: WE ARE GOING
7 OFF THE RECORD AT 12.17 P.M.

8 (A SHORT BREAK FROM 12.17 P.M. TO 12.35 P.M.)

9 THE COURT REPORTER: WE ARE GOING
10 BACK ON THE RECORD AT 12.35 P.M.

11 BY MISS LEAHY:

12 Q. MISS PEARSON, YOU WILL RECALL
13 EARLIER THIS MORNING WE WERE HAVING A DISCUSSION
14 ABOUT WHAT TEST THE LIQUIDATOR SHOULD APPLY WHEN
15 HE IS SUMMARILY DETERMINING WHETHER A COMPANY IS
16 SOLVENT, INSOLVENT OR OF DOUBTFUL SOLVENCY?

17 A. YES.

18 Q. AND I SUGGESTED TO YOU THAT HE
19 WOULD HAVE TO APPLY A BALANCE SHEET TEST, DO YOU
20 RECALL?

21 A. MMM-HMM.

22 Q. I THINK YOU DISAGREED WITH ME ON
23 THAT?

24 A. WELL, I DO NOT KNOW. I DO NOT
25 RECALL.

1 Q. DO YOU HAVE A VIEW ON IT?

2 A. HONESTLY, IT IS SOMETHING THAT I
3 WOULD WANT TO GO AWAY AND THINK ABOUT IN AN IDEAL
4 WORLD. I THINK YOU ARE PROBABLY RIGHT THAT IT IS
5 A BALANCE SHEET TEST.

6 Q. YES.

7 A. BUT THE GENERAL TEST FOR INSOLVENCY
8 UNDER CAYMAN LAW, YOU KNOW, IS IT IS A CASH FLOW
9 TEST BUT THERE IS AN ELEMENT OF FUTURITY TO IT AS
10 WELL. I THINK YOU ARE RIGHT THAT IT IS BASICALLY
11 A BALANCE SHEET TEST, BUT I WOULD NOT WANT TO SAY
12 DEFINITIVELY THAT IT IS BALANCE SHEET. YOU ARE
13 GOING TO A SHOW ME SOMETHING NOW THAT SAYS ----

14 Q. I AM GOING TO BE HELPFUL AND I AM
15 GOING TO SHOW YOU A DECISION OF MR. ANDREW JONES.

16 A. OKAY.

17 Q. IT WAS IN THE HERALD LIQUIDATION,
18 WHICH I THINK YOU MIGHT BE FAMILIAR WITH.

19 A. OKAY. YES.

20 (EXHIBIT 6 MARKED FOR IDENTIFICATION)

21 Q. I THINK THE QUICKEST THING TO DO IS
22 IF I COULD ASK YOU TO LOOK AT PARAGRAPH 5, AND IF
23 YOU WOULD NOT MIND READING THE WHOLE OF PARAGRAPH
24 5 TO YOURSELF? (PAUSE FOR READING)

25 A. OKAY.

1 Q. I WAS ALSO GOING TO INVITE YOU TO
2 READ PARAGRAPH 9(3) ON PAGE 6? (PAUSE FOR
3 READING)

4 A. WHICH WAS THE OTHER PARAGRAPH?

5 I HAVE READ PARAGRAPH 5.

6 Q. THANK YOU. AND 9(3) ON PAGE 6.

7 (PAUSE FOR READING)

8 A. CAN I QUICKLY READ THE REST OF IT?

9 Q. ABSOLUTELY, FEEL FREE. (PAUSE FOR
10 READING)

11 A. OKAY.

12 Q. THANK YOU. I WANT TO DRAW OUT TWO
13 POINTS FROM THAT DECISION.

14 A. YES.

15 Q. THE FIRST IS THAT THE JUDGE THERE
16 CONSIDERED THAT THE APPROPRIATE TEST TO APPLY WAS
17 A BALANCE SHEET TEST.

18 A. YES.

19 Q. THAT IS POINT NUMBER 1. POINT
20 NUMBER 2 IS HE SAID THAT DOUBTFUL SOLVENCY IS NOT
21 A FALL-BACK POSITION. HOWEVER HARD THE
22 DETERMINATION IS, YOU SHOULD TRY TO MAKE IT.

23 A. YES.

24 Q. AND WOULD YOU AGREE WITH ME THAT
25 THAT IS BECAUSE IT IS ACTUALLY A QUITE IMPORTANT

1 DECISION IN TERMS OF WHO GETS TO SIT ON THE
2 LIQUIDATION COMMITTEE?

3 A. YES, IT IS A FUNDAMENTAL DECISION.

4 Q. IN LIGHT OF THIS AUTHORITY, I JUST
5 WANT US TO REVISIT A DISCUSSION WE HAD EARLIER
6 ABOUT THE REAL ESTATE COMPANY.

7 A. OKAY.

8 Q. DO YOU RECALL THAT IS A REAL ESTATE
9 COMPANY AND IT IS IN SOLVENT LIQUIDATION, AND ALL
10 THE LIQUIDATOR HAS TO DO IS TO SELL OFF ALL ITS
11 PROPERTY. THAT IS THE FACTUAL HYPOTHESIS THAT WE
12 ARE WORKING ON. HE HAD NOT AS YET BEEN ABLE TO
13 SELL OFF THE PROPERTY AND SO HE WAS NOT ABLE TO
14 PAY THE CREDITORS AS THEIR DEBTS FELL DUE.

15 A. YES.

16 Q. AND THEY ALL WERE GOING TO HAVE TO
17 WAIT UNTIL THE PROPERTY WAS REALISED?

18 A. MMM-HMM.

19 Q. NOW, BY THIS AUTHORITY, DO YOU
20 ACCEPT THAT THAT COMPANY SHOULD HAVE BEEN
21 DETERMINED AS SOLVENT FOR THE PURPOSES OF ORDER 8?

22 A. IF YOU FOLLOW THE APPROACH THAT
23 JONES TOOK IN THIS CASE, THEN YES.

24 Q. AND IF THE LIQUIDATOR WAS
25 PROPOSING, WHILE HE WAS WAITING FOR THE REAL

1 ESTATE TO BE REALISED, TO COMMENCE LITIGATION
2 AGAINST A THIRD PARTY, WHICH IF UNSUCCESSFUL WOULD
3 MEAN THAT THE CREDITORS WOULD NOT RECEIVE
4 STATUTORY INTEREST IN THAT SITUATION, WOULD YOU
5 AGREE THAT THE COMPANY IS STILL SOLVENT?

6 A. WELL, I THINK THAT IS A VERY
7 DIFFICULT QUESTION TO ANSWER IN THE HYPOTHETICAL.
8 YOU ARE SAYING IF HE WAS CONSIDERING COMMENCING
9 -----

10 Q. HE HAS NOT STARTED THE LITIGATION.

11 A. OKAY.

12 Q. HE IS CONSIDERING STARTING THE
13 LITIGATION?

14 A. BUT OBVIOUSLY, YOU KNOW, THE
15 LIQUIDATOR IN THAT CASE NEEDS TO MAKE AN
16 ASSESSMENT. IS HE GOING TO START -----

17 Q. YES.

18 A. ----- THE LITIGATION?

19 Q. YES.

20 A. THAT IS THE FIRST VARIABLE, AND
21 THEN THERE IS AN ASSESSMENT OF THE PROSPECTS, THE
22 MERITS OF THE LITIGATION.

23 Q. WHAT DOES HE TELL THE COURT WHEN HE
24 GOES FOR SANCTION? HE HAS TO GO FOR SANCTION TO
25 COMMENCE -----

1 A. HE HAS TO GO FOR SANCTION. ON THE
2 SANCTION APPLICATION, HE OBVIOUSLY HAS TO DRAW THE
3 COURT'S ATTENTION TO THE MERITS OF THE LITIGATION
4 AND THE ADVICE THAT HE HAS RECEIVED ON THAT.
5 SORRY, WHAT IS YOUR QUESTION? WHAT DOES HE TELL
6 THE COURT?

7 Q. YES. IS HE TELLING THE COURT THAT
8 THIS IS A SOLVENT LIQUIDATION AND THAT THE COURT
9 ONLY NEEDS TO TAKE INTO ACCOUNT THE INTEREST OF
10 THE SHAREHOLDERS?

11 MR. MORRIS: I AM GOING TO OBJECT
12 TO THE HYPOTHETICAL AS INCOMPLETE.

13 MISS LEAHY: I WILL HAVE TO READ MY
14 QUESTION.

15 MR. MORRIS: I CAN ELABORATE IF YOU
16 WOULD LIKE, BUT I DO NOT WANT TO SCUTTLE THE
17 RECORD IF YOU DO NOT WANT ME TO.

18 BY MISS LEAHY:

19 Q. THE LIQUIDATOR GOES TO COURT FOR
20 SANCTION ----

21 A. MMM-HMM.

22 Q. ---- TO COMMENCE LITIGATION.

23 A. OKAY.

24 Q. HE SAYS I WOULD LIKE TO COMMENCE
25 THIS LITIGATION.

1 A. YES.

2 Q. PROSPECTS OF SUCCESS ARE 65%.

3 A. OKAY.

4 Q. IF I BRING THIS LITIGATION AND
5 SUCCEED, THE SHAREHOLDERS ARE GOING TO GET 50P IN
6 THE POUND.

7 A. MMM-HMM.

8 Q. IF I DO NOT BRING THIS LITIGATION,
9 THE SHAREHOLDERS ARE ONLY GOING TO GET 25P IN THE
10 POUNDS, SAY.

11 A. MMM-HMM.

12 Q. IF I BRING THIS LITIGATION AND
13 LOSE, I MAY NOT HAVE SUFFICIENT MONEY TO PAY THE
14 CREDITORS' INTEREST ON THEIR DEBTS. WHEN HE GOES
15 TO COURT, DOES HE TELL THE COURT, I HAVE
16 DETERMINED THAT IT IS SOLVENT AND YOU ONLY NEED TO
17 TAKE INTO ACCOUNT THE INTEREST OF THE
18 SHAREHOLDERS?

19 A. SO AT THIS POINT HE IS ALREADY GOT
20 A LIQUIDATION COMMITTEE, WHICH IS MADE UP OF
21 SHAREHOLDERS ONLY, BECAUSE HE HAS ALREADY
22 DETERMINED THE COMPANY TO BE SOLVENT.

23 Q. YES.

24 A. SO BEFORE MAKING HIS SANCTION
25 APPLICATION HE WILL HAVE CONSULTED WITH THAT

1 LIQUIDATION COMMITTEE. SO PROBABLY IN HIS
2 SANCTION APPLICATION HE IS GOING TO TELL THE COURT
3 WHAT THE LIQUIDATION COMMITTEE THINKS. HE IS
4 GOING TO TELL THEM THE ADVICE THAT HE HAS RECEIVED
5 ON THE MERITS. WHAT IS YOUR QUESTION?

6 Q. WHAT IS HE GOING TO SAY ABOUT THE
7 INTEREST OF CREDITORS? THAT IS ALL I AM TRYING TO
8 GET TO IN THIS SITUATION, BECAUSE YOU HAVE SAID ON
9 A NUMBER OF OCCASIONS, LOOK, ONCE WE ARE IN A
10 SOLVENT LIQUIDATION, THE LIQUIDATOR ACTS IN THE
11 INTEREST OF THE SHAREHOLDERS. SO WHAT I AM TRYING
12 TO POSIT TO YOU IS THE SLIGHTLY COMPLICATED
13 SITUATION ----

14 A. YES.

15 Q. ---- AND SAY HE IS ON HIS SANCTION
16 APPLICATION, YOU SAY CREDITORS HAVE NO RIGHT TO BE
17 HEARD, HOW ARE CREDITORS PROTECTED IN THIS
18 SITUATION? THAT IS WHAT I AM TRYING TO
19 UNDERSTAND.

20 A. HMM, YES. I THINK THE PROTECTION
21 FOR THE CREDITORS IS THE OBLIGATION ON THE
22 LIQUIDATOR TO KEEP HIS OR HER SOLVENCY
23 DETERMINATION UNDER REVIEW. SO, IN A SITUATION
24 LIKE YOUR HYPOTHETICAL WHERE THE LIQUIDATOR HAS
25 DECIDED TO BRING LITIGATION AND THE EFFECT OF

1 COMMENCING THE LITIGATION IS THAT THERE IS NOW A
2 RISK, WHICH THERE WAS NOT BEFORE, THAT CREDITORS
3 MAY NOT BE PAID IN FULL, THEN THAT IS A POINT AT
4 WHICH THE LIQUIDATOR SHOULD BE CONSIDERING
5 CHANGING HIS DETERMINATION FROM SOLVENT TO
6 DOUBTFUL SOLVENCY.

7 Q. ARE YOU SAYING THAT HE SHOULD MAKE
8 THE DETERMINATION BEFORE HE GOES TO COURT FOR
9 SANCTION OR AFTER HE GETS SANCTION?

10 A. ERM ----

11 Q. PUT IT THIS WAY. IF HE DOES NOT
12 MAKE THE DETERMINATION BEFORE HE GOES TO COURT, ON
13 YOUR EVIDENCE CREDITORS DO NOT GET A SAY?

14 A. YES, CORRECT. SO IT SHOULD BE
15 BEFORE SO THAT CREDITORS HAVE THE RIGHT TO BE
16 HEARD ON THE QUESTION OF WHETHER THE LITIGATION IS
17 COMMENCED.

18 Q. AND THEN THE COURT HAS TO MAKE A
19 DETERMINATION AND THE COURT RULES THAT IT IS NOT
20 GOING TO GRANT SANCTION. THAT IS THE ASSUMPTION.
21 IS IT YOUR POSITION THEN THAT THE LIQUIDATOR WOULD
22 HAVE TO CHANGE HIS DETERMINATION IMMEDIATELY AGAIN
23 AFTER THAT RULING CAME OUT AND DETERMINE THAT THE
24 COMPANY WAS SOLVENT BECAUSE HE WAS NOT BRINGING
25 THE LITIGATION?

1 A. SORRY, I AM GETTING A BIT -- I AM
2 TRYING TO KEEP UP WITH ALL MY ASSUMPTIONS. I AM
3 ASSUMING THAT HE HAS BROUGHT HIS SANCTION
4 APPLICATION AND THE SANCTION HAS BEEN REFUSED, SO
5 HE IS NOT GOING TO BRING HIS LITIGATION, BUT HE
6 STILL HAS ALL OF HIS PROPERTIES THAT HE IS GOING
7 TO SELL. YES, I MEAN, AT FIRST BLUSH WITHOUT
8 GIVING THIS SITUATION THE PROPER CONSIDERATION
9 THAT I WOULD IF IT AROSE DURING THE COURSE OF MY
10 PRACTICE, AT FIRST BLUSH MY IMPRESSION IS YES.

11 Q. I WILL JUST BREAK IT DOWN AGAIN SO
12 THAT YOU ARE COMFORTABLE WITH THE QUESTION BECAUSE
13 I CAN APPRECIATE THERE HAVE BEEN A LOT OF
14 DIFFERENT HYPOTHESES THERE.

15 A. OKAY.

16 Q. TO GO OVER IT AGAIN, THE LIQUIDATOR
17 HAS DETERMINED THAT THE COMPANY IS SOLVENT.

18 A. YES.

19 Q. BUT HE WANTS TO BRING THIS
20 LITIGATION AND THAT PUTS THE SOLVENCY AT RISK.

21 A. MMM-HMM.

22 Q. SO YOU HAVE SAID IN THAT SITUATION
23 THE SENSIBLE THING FOR HIM TO DO WOULD BE TO
24 DETERMINE THAT THE COMPANY WAS OF INSOLVENT OR
25 DOUBTFUL SOLVENCY ----

1 A. MMM-HMM.

2 Q. ----- AND THEN MAKE AN APPLICATION
3 FOR SANCTION TO COURT.

4 A. YES.

5 Q. THEN MY NEXT PART OF THE HYPOTHESIS
6 WAS THE COURT HAS RULED THAT HE SHOULD NOT HAVE
7 SANCTION.

8 A. MMM-HMM.

9 Q. IT FOLLOWS THAT HE IS NOT GOING TO
10 BE BRINGING THE LITIGATION. SO IT FOLLOWS THAT
11 THIS RISK OF INSOLVENCY THAT THE LIQUIDATOR WAS
12 TRYING TO ADDRESS WHEN HE MADE HIS REDETERMINATION
13 IS NO LONGER THERE.

14 A. HMM.

15 Q. ALL I WANTED TO KNOW IS WHETHER IN
16 THAT SITUATION THE LIQUIDATOR SHOULD THEN MAKE A
17 FURTHER REDETERMINATION?

18 A. OKAY.

19 Q. DOES THAT MAKE SENSE?

20 A. YES.

21 Q. IS THAT CLEARER?

22 A. YES.

23 Q. OKAY. YOU WOULD SAY YES, HE
24 SHOULD?

25 A. YES. I MEAN, AT FIRST BLUSH, YOU

1 KNOW, ASSUMING ALL OF THIS AND DOING IT
2 HYPOTHETICALLY IN THIS VERY ARTIFICIAL SITUATION,
3 YES, BUT, YOU KNOW, IN REAL LIFE YOU WOULD GIVE IT
4 A LOT MORE CONSIDERATION AND YOU WOULD HAVE A LOT
5 MORE FACTS AT YOUR FINGER TIPS, BUT IN PRINCIPLE,
6 YES.

7 Q. IN REAL LIFE IN FACT A LIQUIDATOR
8 WOULD NOT GO TO ALL THIS TROUBLE OF DETERMINING
9 AND REDETERMINING. WHAT HE WOULD DO IS INVITE THE
10 COURT TO DIRECT THAT THE CREDITORS BE SERVED SO
11 THEY COULD MAKE REPRESENTATIONS IF THEY WISHED TO.
12 IS THAT NOT WHAT HE WOULD DO IN REAL LIFE?

13 A. IN REAL LIFE, IN MY EXPERIENCE,
14 I KNOW EXACTLY WHAT JONES SAID IN THE HERALD
15 DECISION THAT YOU HAVE JUST SHOWN ME THAT THE
16 LIQUIDATOR SHOULD NOT DO, BUT IN MY EXPERIENCE
17 THEY OFTEN GO WITH A DOUBTFUL SOLVENCY
18 DETERMINATION AT THE START OF THE LIQUIDATION
19 BECAUSE THEY DO NOT HAVE SUFFICIENT INFORMATION AT
20 THAT POINT TO SAY FOR SURE THAT CREDITORS ARE
21 GOING TO BE PAID IN FULL. HAVING DETERMINED THE
22 COMPANY TO BE OF DOUBTFUL SOLVENCY, BOTH THE
23 CREDITORS AND THE SHAREHOLDERS ARE REPRESENTED ON
24 THE LIQUIDATION COMMITTEE, THEY BOTH GET THE
25 REPORTS AND THEY BOTH HAVE A RIGHT TO PARTICIPATE.

1 THEN YOU KIND OF AVOID ALL OF THESE HYPOTHETICAL
2 TYPE SITUATIONS THAT YOU ARE TRYING TO TAKE ME
3 THROUGH.

4 Q. YES, BUT, I MEAN, HAVING READ THAT
5 DECISION, ONE SEES THAT IT IS NOT THE FALL-BACK
6 POSITION, RIGHT, AND YOU ACCEPT THAT?

7 A. I ACCEPT THAT IS WHAT JONES SAID ON
8 HERALD.

9 Q. YOU ALSO ACCEPTED, I THOUGHT, THAT
10 THERE WAS A GOOD REASON FOR WHAT HE DETERMINED IN
11 HERALD, NAMELY THAT IT IS SUCH A FUNDAMENTALLY
12 IMPORTANT THING WHO GETS TO SIT ON THE LIQUIDATION
13 COMMITTEE AND WHO GETS TO ESSENTIALLY HAVE A SAY,
14 A SIGNIFICANT SAY IN HOW THE LIQUIDATOR CONDUCTS
15 THE LIQUIDATION?

16 A. BUT WHAT HE WAS SAYING -- SO THE
17 APPLICATION THAT WAS BEFORE HIM ON HERALD WAS AN
18 APPLICATION BY THE LIQUIDATORS TO FORM A
19 LIQUIDATION COMMITTEE THAT DID NOT COMPLY WITH THE
20 RULES.

21 Q. YES.

22 A. SO THEY HAD DETERMINED IT TO BE OF
23 DOUBTFUL SOLVENCY.

24 Q. YES.

25 A. BUT THEY WANTED TO HAVE A

1 LIQUIDATION COMMITTEE THAT WAS COMPRISED OF
2 SHAREHOLDERS ONLY. JONES SAID NO, AND HE SAID NO
3 BECAUSE THE LIQUIDATION COMMITTEE HAS TO REFLECT
4 THOSE WHO HAVE THE UNDERLYING ECONOMIC INTEREST.
5 SO THAT WAS WHY HE SENT THE LIQUIDATORS BACK TO
6 THE DRAWING BOARDS TO ACTUALLY LOOK MORE CAREFULLY
7 AT THE FINANCIAL SITUATION OF THE COMPANY AND
8 REVISIT THEIR SOLVENCY DETERMINATION.

9 Q. YES, BECAUSE IT WOULD BE VERY
10 UNFAIR IF THEY WERE RIGHT THAT IT WAS THEREFORE
11 DOUBTFULLY SOLVENT. IT WOULD BE TERRIBLY UNFAIR
12 TO THE CREDITORS IF THEY DID NOT HAVE A SEAT ON
13 THE LIQUIDATION COMMITTEE, CORRECT?

14 A. YES.

15 Q. AND IF IN FACT IT WAS INSOLVENT, IT
16 WOULD BE UNFAIR ON THE CREDITORS IF THE
17 CONTRIBUTORIES HAD A SEAT AT THE LIQUIDATION
18 TABLE?

19 MR. MORRIS: OBJECTION TO THE FORM
20 OF THE QUESTION.

21 A. YES.

22 BY MISS LEAHY:

23 Q. AND IF IT WAS SOLVENT, IT WOULD BE
24 UNFAIR ON THE CONTRIBUTORIES IF THE CREDITORS HAD
25 A SEAT AT THE TABLE?

1 MR. MORRIS: OBJECTION TO THE FORM
2 OF THE QUESTION.

3 MISS LEAHY: WHAT IS THE BASIS OF
4 THE OBJECTION?

5 MR. MORRIS: I AM JUST READING THE
6 OPINION. IT SAYS THERE ARE NO ORDINARY CREDITORS.
7 SO YOUR HYPOTHETICAL IS COMPLETELY UNTETHERED, AT
8 LEAST IN MY READING OF THE OPINION. IN PARAGRAPH
9 5 IT SAYS SPECIFICALLY "THERE ARE NO ORDINARY
10 CREDITORS (APART FROM THE PETITIONER'S CLAIM FOR
11 THE COSTS OF THE PETITION)." SO WHEN YOU TALK
12 ABOUT CREDITORS, LIKE IN THE CONTEXT OF THIS CASE,
13 I SAYS THERE ARE NONE.

14 MISS LEAHY: I AM JUST MAKING SOME
15 GENERAL PROPOSITIONS HERE.

16 MR. MORRIS: I THOUGHT YOU WERE
17 TALKING ABOUT THIS CASE.

18 MISS LEAHY: NO, I AM EXTRACTING
19 FROM THE PRINCIPLE THAT IS IN THAT CASE.

20 MR. MORRIS: OKAY. I APPRECIATE
21 THAT.

22 MISS LEAHY: COUNSEL HAS READ IT IN
23 FULL. I AM SURE SHE IS MORE THAN ABLE TO TELL ME
24 WHAT IT SAYS AND DOES NOT SAY.

25 MR. MORRIS: I WOULD NOT HAVE SAID

1 ANYTHING IF YOU DID NOT ASK.

2 MISS LEAHY: I WISH I HAD NOT NOW.

3 MR. MORRIS: I BET. (LAUGHTER)

4 BY MISS LEAHY:

5 Q. EXHIBIT 7.

6 (EXHIBIT 7 MARKED FOR IDENTIFICATION)

7 LET ME HAND UP TO YOU SECTION 101

8 OF THE US BANKRUPTCY CODE.

9 A. OKAY.

10 Q. IT IS EXHIBIT 7.

11 A. THANK YOU.

12 Q. WE ARE ONLY GOING TO LOOK AT ONE
13 DEFINITION, WHICH IS THE DEFINITION OF FOREIGN
14 PROCEEDING, WHICH I AM SURE YOU ARE FAMILIAR WITH.
15 THAT IS SUBSECTION (23). I THINK IT IS PAGE 5 OF
16 YOUR PRINTOUT.

17 A. YES.

18 Q. DO YOU WANT TO KEEP THAT OPEN
19 BESIDE YOU BECAUSE I AM GOING TO REFER TO IT A FEW
20 TIMES?

21 A. OKAY.

22 Q. THE CONTEXT IN WHICH YOU ARE GIVING
23 YOUR EVIDENCE IS THIS. AS I AM SURE YOU KNOW, THE
24 US COURT AT SOME POINT HAS TO DECIDE WHETHER THE
25 CAYMAN PROCEEDING IS A FOREIGN PROCEEDING WITHIN

1 THE MEANING OF SECTION 101(23) OF THE BANKRUPTCY
2 CODE, OKAY?

3 A. YES.

4 Q. WE HAVE THIS DEFINITION IN
5 SUBSECTION (23). IT IS ONE THAT IS FAMILIAR TO
6 MOST PEOPLE PRACTISING IN INSOLVENCY AND
7 RESTRUCTURING BECAUSE IT DERIVES FROM THE UNCITRAL
8 MODEL LAW. I JUST WANTED TO TAKE IT IN STAGES,
9 BECAUSE THERE ARE A NUMBER OF WORDS IN THIS
10 DEFINITION THAT ARE CONTROVERSIAL IN THE CHAPTER
11 15 PROCEEDINGS, WHICH I AM SURE YOU ARE AWARE OF.
12 COULD YOU LOOK AT THE VERY LAST PART OF THE
13 DEFINITION? WE HAVE, "... UNDER A LAW RELATING TO
14 INSOLVENCY OR ADJUSTMENT OF DEBT", AND THEN THIS
15 IS THE PART I WANT TO EMPHASISE, "IN WHICH
16 PROCEEDING THE ASSETS AND AFFAIRS OF THE DEBTOR
17 ARE SUBJECT TO CONTROL OR SUPERVISION BY A FOREIGN
18 COURT, FOR THE PURPOSE OF REORGANIZATION OR
19 LIQUIDATION." CAN WE AGREE THAT THE CAYMAN
20 PROCEEDING IS ONE IN WHICH THE ASSETS AND AFFAIRS
21 OF ASCENTRA ARE SUBJECT TO THE SUPERVISION OF THE
22 CAYMAN COURT FOR THE PURPOSES OF LIQUIDATION?

23 A. YES.

24 Q. I THOUGHT THAT WAS GOING TO BE
25 UNCONTROVERSIAL. SO NOW I AM COMING ON TO THE

1 NEXT QUESTION, WHICH I DO NOT KNOW YOUR VIEW ON
2 BUT IT RELATES TO THE PHRASE IN THE FIRST PART OF
3 THE DEFINITION. WE SEE A PHRASE "COLLECTIVE
4 JUDICIAL OR ADMINISTRATIVE PROCEEDING IN A FOREIGN
5 COUNTRY". I JUST WANT TO FOCUS ON THE WORDS
6 "JUDICIAL PROCEEDING", OKAY? ALL OFFICIAL
7 LIQUIDATION, SOLVENT OR INSOLVENT, ARE INITIATED
8 AND SUPERVISED BY THE CAYMAN COURT AND CAN ONLY BE
9 TERMINATED BY THE CAYMAN COURT, RIGHT? WE
10 ESTABLISHED ALL OF THAT EARLIER?

11 A. YES.

12 Q. SO YOU WOULD AGREE, WOULD YOU NOT,
13 THAT OFFICIAL LIQUIDATIONS ARE JUDICIAL
14 PROCEEDINGS?

15 A. YES. I MEAN, I SHOULD SAY WITH ALL
16 OF THIS THAT IT IS NOT REALLY FOR ME TO INTERPRET
17 THE US BANKRUPTCY CODE. I MEAN, I CAN GIVE YOU MY
18 OPINION ON IT, BUT OBVIOUSLY IT IS A MATTER FOR
19 THE NEW YORK COURT. BUT TO MY UNDERSTANDING OF
20 THE WORDS USED, I WOULD SAY THAT IT IS A JUDICIAL
21 PROCEEDING.

22 Q. ACTUALLY, I AM QUITE INTERESTED IN
23 THIS, BECAUSE YOU KNOW IN THE TCA GLOBAL MATTER
24 THAT WE DISCUSSED EARLIER, WHICH WAS EXHIBIT 5,
25 YOU ACTUALLY DID GIVE AN OPINION ON WHETHER THE

1 CAYMAN PROCEEDINGS IN THAT CASE WERE A JUDICIAL
2 PROCEEDING?

3 A. OKAY.

4 Q. IS THERE A REASON WHY IN THIS CASE
5 YOU HAVE NOT IN YOUR DECLARATION SOUGHT TO OPINE
6 ON WHETHER YOU CONSIDERED THE PROCEEDING TO BE A
7 JUDICIAL PROCEEDING OR NOT?

8 A. DO YOU WANT TO TAKE ME TO THE
9 RELEVANT PARAGRAPH OF THE TCA DECLARATION?

10 Q. YES, SURE. YOU GO TO 19,
11 I BELIEVE, ON PAGE 5. ROGUE REFERENCE; IT MUST BE
12 PARAGRAPH 19.

13 MR. MCDONALD: PARAGRAPH 19, PAGE 7
14 OF 10 AT THE TOP.

15 BY MISS LEAHY:

16 Q. YOU SAY, "THE WINDING UP PROCEEDING
17 IS ALSO A JUDICIAL PROCEEDING IN THE SENSE THAT IT
18 IS INITIATED BY ORDER OF, PRESIDED OVER AND
19 SIGNIFIES BY, AND MAY NOT BE TERMINATED EXCEPT BY
20 ORDER OF, THE CAYMAN COURT."

21 A. YES. I MEAN, AS I HAVE JUST SAID,
22 I DO THINK IT IS A JUDICIAL PROCEEDING. I DO NOT
23 THINK IT IS REALLY MY FUNCTION -- CERTAINLY THE
24 EVIDENCE THAT I HAVE GIVEN IN THE ASCENTRA
25 PROCEEDING IS FOCUSED ON THE NATURE OF THE CAYMAN

1 PROCEEDING, BUT I WOULD NOT GO SO FAR AS TO TRY
2 AND APPLY THE US BANKRUPTCY CODE, BECAUSE THAT
3 IS NOT ----

4 Q. WHAT PRECISE QUESTIONS WERE YOU
5 INSTRUCTED TO ADVISE ON?

6 A. IN THIS CASE?

7 Q. NO, IN THIS CASE, IN ASCENTRA?

8 A. IN ASCENTRA?

9 Q. YES.

10 A. THE ISSUES THAT ARE SET OUT AT
11 PARAGRAPH 9 OF MY DECLARATION.

12 Q. THESE ARE THE PRECISE ISSUES THAT
13 WERE SET OUT IN YOUR FORMAL LETTER OF INSTRUCTION,
14 ARE THEY?

15 A. YES, I THINK SO.

16 Q. YOU WERE NEVER ASKED WHETHER IN
17 YOUR OPINION THE CAYMAN PROCEEDING WAS A JUDICIAL
18 PROCEEDING?

19 A. NO, NO, BECAUSE THAT IS OBVIOUSLY
20 WHAT THE COURT IS GOING TO HAVE TO DETERMINE.

21 Q. THAT IS WHY I AM CONFUSED, BECAUSE
22 IN TCA YOU SEEMED TO THINK THAT YOU COULD GIVE AN
23 OPINION ON THAT. SO WHAT IS THE DIFFERENCE
24 BETWEEN THE TWO CASES?

25 A. THEY ARE DIFFERENT CASES. BY THE

1 US LAWYERS INSTRUCTING ME IN EACH CASE, I WAS
2 ASKED, YOU KNOW, DIFFERENT QUESTIONS.

3 Q. RIGHT, OKAY. BUT YOU UNDERSTOOD
4 THAT YOU WERE GIVING THIS ADVICE IN A CONTEXT
5 WHERE SHANG PENG WAS CONTESTING THAT THE CAYMAN
6 PROCEEDING WAS NOT A FOREIGN PROCEEDING?

7 A. YES.

8 Q. AND IT WAS CONSIDERED THAT YOU
9 SHOULD OPINE ON THE DIFFERENCES BETWEEN A SOLVENT
10 AND INSOLVENT LIQUIDATION BECAUSE? WHY DO YOU
11 THINK THAT IS RELEVANT? WHY IS IT RELEVANT TO
12 THAT DEBATE?

13 MR. MORRIS: OBJECTION TO THE FORM
14 OF THE QUESTION.

15 A. WELL, BECAUSE I UNDERSTAND THAT IT
16 IS RELEVANT -- WELL, I HAVE SEEN SPGK'S MOTION TO
17 DISMISS, SO I KNOW WHICH LIMBS OF SECTION 101(23)
18 THEY ARE CHALLENGING. BUT MY UNDERSTANDING IS
19 THAT MY ROLE IS SIMPLY TO EXPLAIN THE CAYMAN
20 PROCESS AND NOT TO TAKE THAT FURTHER STEP OF
21 TRYING TO APPLY THAT TO SECTION (23).

22 BY MISS LEAHY:

23 Q. FROM OUR PERSPECTIVE, WE CONSIDER
24 THAT THE US COURT WOULD BE TREMENDOUSLY ASSISTED
25 BY KNOWING WHAT CAYMAN LAW EXPERTS CONSIDERED THE

1 STATUS OF THE CAYMAN PROCEEDINGS TO BE, AND THAT
2 IS WHY WE ARE EXPLORING THOSE DEFINITIONS WITH
3 YOU, YES?

4 A. OKAY.

5 Q. I THINK WE HAVE AGREED THAT THE
6 CAYMAN PROCEEDING IS A JUDICIAL PROCEEDING?

7 A. YES.

8 Q. AND THAT REALLY FOLLOWS FROM SOME
9 PRETTY BASIC PROPOSITIONS THAT WE AGREED AT THE
10 VERY OUTSET?

11 A. YES.

12 Q. I THINK WE CAN ALSO AGREE THAT A
13 VOLUNTARY LIQUIDATION IS NOT A JUDICIAL
14 PROCEEDING?

15 A. YES, I WOULD AGREE WITH THAT.

16 Q. THE NEXT QUESTION IS WHETHER
17 OFFICIAL LIQUIDATIONS ARE COLLECTIVE JUDICIAL
18 PROCEEDINGS.

19 A. YES.

20 Q. NOW, WE HAVE ALREADY ESTABLISHED
21 THE FOLLOWING, WHETHER THE WINDING UP IS SOLVENT
22 OR INSOLVENT, LIQUIDATION IS A CLASS REMEDY?

23 A. YES.

24 Q. THE LIQUIDATOR IS UNDER THE
25 ULTIMATE SUPERVISION OF THE CAYMAN COURT, ALL

1 INDIVIDUAL CLAIMS AGAINST THE DEBTOR ARE STAYED,
2 CORRECT, AND THERE IS A PROOFING PROCEDURE
3 AVAILABLE FOR THE RESOLUTION OF THE CLAIMS OF
4 CREDITORS? THAT IS RIGHT, IS IT NOT?

5 A. IT IS RIGHT TO SAY FOR THE LAST BIT
6 ABOUT THE PROOFING PROCEDURE, WHICH IN A SOLVENT
7 LIQUIDATION ONLY APPLIES TO DISPUTED DEBTS,
8 WHEREAS IN THE INSOLVENT LIQUIDATION IT APPLIES TO
9 ALL DEBTS.

10 Q. OKAY. YOU ALSO ACCEPTED THAT --
11 I THOUGHT YOU DID, BUT I WILL JUST ASK IT AS A NEW
12 QUESTION. IT IS ABSOLUTELY RIGHT THAT IF YOU ARE
13 IN A SOLVENT LIQUIDATION AND YOU CLAIM TO BE A
14 CREDITOR OF THE COMPANY, YOU ARE GOING TO HAVE TO
15 NOTIFY THE LIQUIDATOR IN SOME WAY. SO EVEN IF YOU
16 DO NOT FILL IN A FORMAL PROOF OF DEBT, YOU ARE
17 GOING TO HAVE TO WRITE TO HIM, E-MAIL HIM OR TELL
18 HIM THAT YOU ARE A CREDITOR?

19 A. SEND HIM AN INVOICE LIKE YOU
20 NORMALLY WOULD.

21 Q. EXACTLY, EXACTLY. SO IT IS JUST A
22 DIFFERENT FORM ESSENTIALLY, IS IT NOT, BETWEEN THE
23 TWO PROCESSES?

24 MR. MORRIS: OBJECTION TO THE FORM
25 OF THE QUESTION.

1 A. WELL, I WOULD SAY THERE IS A BIG
2 DIFFERENCE BETWEEN SENDING AN INVOICE TO A COMPANY
3 THAT IS NOT IN ANY LIQUIDATION PROCESS OR TO A
4 COMPANY THAT IS IN A SOLVENT LIQUIDATION PROCESS
5 AND GETTING PAID IN THE ORDINARY COURSE OF
6 BUSINESS AND ON THE OTHER HAND SUBMITTING A PROOF
7 OF DEBT IN AN INSOLVENT LIQUIDATION AND WAITING
8 UNTIL THE LIQUIDATOR HAS SOME FUNDS TO DISTRIBUTE
9 AND THEN GETTING PAID PARI PASSU WITH EVERYBODY
10 ELSE.

11 BY MISS LEAHY:

12 Q. OKAY. I DO NOT WANT TO GO OVER ALL
13 THAT GROUND AGAIN. MY QUESTION THIS TIME
14 I THOUGHT WAS UNCONTROVERSIAL, SO I AM GOING TO
15 TRY TO RE-PUT IT IN A WAY THAT WE MIGHT BE ABLE TO
16 REACH AGREEMENT.

17 A. OKAY.

18 Q. I AM NOT GOING TO USE THE WORD
19 "MECHANISM" BECAUSE I THINK THAT IS GOING TO BE
20 OBJECTED TO AS WELL. THERE ARE PROVISIONS IN THE
21 RULES AND THE ACT THAT ENABLE A LIQUIDATOR TO
22 RESOLVE THE CLAIMS OF CREDITORS IN BOTH A SOLVENT
23 AND INSOLVENT LIQUIDATION?

24 A. YES.

25 Q. THANK YOU. A SOLVENT LIQUIDATION,

1 AND WE SAID THIS IS A CLASS REMEDY, SO IT IS NOT A
2 TWO-PARTY DISPUTE, RIGHT?

3 A. NO.

4 Q. SO YOU WOULD AGREE, WOULD YOU NOT,
5 THAT A CAYMAN LIQUIDATION IS NOT JUST A JUDICIAL
6 PROCEEDING, IT IS A COLLECTIVE JUDICIAL
7 PROCEEDING?

8 A. YES, IT IS A COLLECTIVE JUDICIAL
9 PROCEEDING FOR THE BENEFIT OF ASCENTRA
10 SHAREHOLDERS.

11 Q. WHY DID YOU CAVEAT IT IN THAT WAY?
12 I DO NOT FOLLOW, BECAUSE THE CREDITORS ALSO GET
13 PAID BY THE LIQUIDATOR, DO THEY NOT?

14 A. THEY GET PAID, BUT THEY ARE GOING
15 TO GET PAID ANYWAY. SO THERE IS NO BENEFIT TO
16 THEM FROM THE COMPANY BEING IN A SOLVENT
17 LIQUIDATION PROCESS AS OPPOSED TO IT NOT BEING IN
18 ANY PROCESS AT ALL. IT MAKES NO DIFFERENCE TO
19 THEM BECAUSE THEY ARE GOING TO GET PAID.

20 Q. THE LIQUIDATOR IS HAVING TO COLLECT
21 AND REALISE THE ASSETS OF THE COMPANY, CORRECT?

22 A. YES.

23 Q. AND THE LIQUIDATION IS UNDER THE
24 SUPERVISION OF THE COURT, SO THE CREDITORS BENEFIT
25 FROM THAT PROTECTION TOO, DO THEY NOT?

1 A. WELL, IF IT IS SOLVENT, THE
2 CREDITORS DO NOT NEED THE PROTECTION OF THE COURT
3 BECAUSE THEY ARE GOING TO GET PAID.

4 Q. WHAT IF THE LIQUIDATION GOT THE
5 DETERMINATION WRONG? IT TURNS OUT THE COMPANY IS
6 INSOLVENT -- WE HAVE HEARD OF THAT HAPPENING -- IN
7 THAT SITUATION DO YOU THINK CREDITORS NEVER NEED
8 THE PROTECTION OF THE COURT BECAUSE THERE IS A
9 SOLVENCY DETERMINATION? THAT CANNOT BE RIGHT, CAN
10 IT?

11 A. SORRY, WHAT IS YOUR QUESTION?

12 Q. THE CREDITORS NEVER NEED THE
13 PROTECTION OF THE COURT WHERE THERE HAS BEEN A
14 DETERMINATION OF SOLVENCY. YOU ARE NOT GOING THAT
15 FAR, ARE YOU?

16 A. YOU ARE ASKING ME DO CREDITORS
17 NEVER NEED THE ----

18 Q. PROTECTION OF THE COURT.

19 A. ---- PROTECTION OF THE COURT
20 BECAUSE ----

21 Q. AFTER A SOLVENCY DETERMINATION HAS
22 BEEN MADE?

23 A. SO WE ARE NOW THINKING OF
24 HYPOTHETICAL SITUATIONS WHERE A SOLVENCY
25 DETERMINATION HAS BEEN MADE BUT ----

1 Q. ALL I AM SAYING IS THAT -- ALL
2 I SAID WAS THAT THERE IS OBVIOUSLY ALWAYS A RISK
3 THAT AN OFFICE HOLDER MIGHT HAVE GOT THE
4 DETERMINATION WRONG.

5 A. YES.

6 Q. YOU SAW THAT IN THE -----

7 A. HERALD.

8 Q. HERALD CASE. IT IS JUST A SUMMARY
9 DETERMINATION, RIGHT?

10 A. YES.

11 Q. SO THE LIQUIDATOR COMES ALONG AND
12 SAYS I THINK THIS IS COMPANY IS SOLVENT. A YEAR
13 DOWN THE LINE HE SAYS IT IS INSOLVENT, RIGHT?

14 A. YES.

15 Q. IN THE BACKGROUND, IN THIS YEARLONG
16 PERIOD, ARE YOU SAYING THAT THE CREDITORS ARE NOT
17 EVER IN ANY WAY EXPOSED?

18 A. WELL, WHAT SHOULD BE HAPPENING IN
19 THE YEARLONG PERIOD AFTER HE HAS ISSUED HIS
20 SOLVENCY DETERMINATION IS THAT THE CREDITORS ARE
21 PAID IN THE ORDINARY COURSE OF BUSINESS. SO THEY
22 ARE SUBMITTING THEIR INVOICES AND GETTING PAID AS
23 THEIR DEBTS FALL DUE AS IF THE COMPANY WERE NOT IN
24 A PROCESS AT ALL.

25 Q. BUT THAT MIGHT NOT HAPPEN FOR

1 REASONS THAT WE EXPLORED EARLIER; FOR EXAMPLE,
2 THERE IS SOME ILLIQUID ASSETS THAT HAVE TO BE
3 REALISED?

4 A. YES, YES.

5 Q. YES? IS THAT NOT THE SORT OF
6 SITUATION WHERE THERE IS A RISK OF THE INITIAL
7 DETERMINATION TURNING OUT TO BE WRONG?

8 A. YES, AND HAVING TO BE REVISITED,
9 YES.

10 Q. YES.

11 A. YES.

12 Q. SO DURING THAT YEARLONG PERIOD, THE
13 CREDITORS ARE AT LEAST, YOU KNOW, THEORETICALLY AT
14 RISK, ARE THEY NOT, THAT THEY WILL NOT GET PAID IN
15 FULL?

16 A. BUT THEN THIS COMES BACK TO ONE OF
17 YOUR QUESTIONS EARLIER AS WELL, THAT THERE IS
18 ALWAYS A RISK AS A CREDITOR, YOU KNOW, YOU ISSUE
19 AN INVOICE AND THERE IS ALSO A RISK THAT YOU MIGHT
20 NOT GET PAID.

21 Q. OKAY. I THINK BEFORE YOU WERE
22 SUGGESTING THAT THE RISKS I WAS TALKING ABOUT WERE
23 FARFETCHED, WHEREAS I THINK I AM GIVING YOU A
24 SLIGHTLY MORE REALISTIC EXAMPLE, PERHAPS YOU MIGHT
25 ACCEPT NOW, THAT THE LIQUIDATOR COULD SIMPLY HAVE

1 GOT THE DETERMINATION WRONG THE FIRST TIME AROUND,
2 THROUGH NO FAULT OF HIS OWN, HE IS JUST DOING HIS
3 BEST ----

4 A. YES.

5 Q. ---- AND THEN SUBSEQUENTLY FINDS
6 THAT, IN FACT, LOOKING AT THINGS MORE CLOSELY, OR
7 MORE INFORMATION COMING TO LIGHT, THAT THE COMPANY
8 IS INSOLVENT?

9 A. YES.

10 Q. THAT IS NOT FARFETCHED, IS IT, THAT
11 RISK ----

12 A. THAT COULD HAPPEN.

13 Q. IT IS NOT REALLY RIGHT, IS IT, TO
14 SAY THAT IT IS A COLLECTIVE JUDICIAL PROCEEDING
15 FOR THE BENEFIT JUST OF SHAREHOLDERS?

16 MR. MORRIS: OBJECTION TO THE FORM
17 OF THE QUESTION.

18 A. I THINK THAT IS CORRECT.

19 BY MISS LEAHY:

20 Q. SHAREHOLDERS CANNOT GET PAID BEFORE
21 THE CREDITORS ARE PAID, CAN THEY?

22 A. NO.

23 Q. EVER?

24 A. NO.

25 Q. AND SHAREHOLDERS CANNOT GET PAID IN

1 FACT BEFORE THE CREDITORS, NOT ONLY GET PAID 100%
2 IN THE POUND BUT ALSO GET STATUTORY INTEREST ON
3 THEIR DEBTS, CORRECT?

4 A. CORRECT.

5 Q. AND THE PERSON WHO ADJUDICATES ON
6 THE CREDITORS' CLAIMS AND WHO REALISES THE ASSETS
7 TO PAY THE CREDITORS AND CALCULATES THE STATUTORY
8 INTEREST AND PAYS THE CREDITORS IS THE OFFICIAL
9 LIQUIDATOR, RIGHT?

10 A. YES.

11 Q. SO IT IS A COLLECTIVE JUDICIAL
12 PROCEEDING FOR THE BENEFIT OF THE CREDITORS AND
13 THE SHAREHOLDERS, IS IT NOT?

14 A. WELL, NO, BECAUSE THE CREDITORS ARE
15 GOING TO GET PAID ANYWAY. THE CREDITORS WOULD GET
16 PAID IF IT WAS NOT IN THAT PROCESS. THE PROCESS
17 IS TO WIND UP THE COMPANY AND RETURN THE ASSETS TO
18 THE SHAREHOLDERS WHO IF IT WAS NOT IN THAT PROCESS
19 WOULD BE STUCK FOREVER IN A DEADLOCKED COMPANY.

20 Q. BUT YOU DO NOT KNOW THAT
21 DEFINITIVELY, DO YOU, AT THE OUTSET OF THE
22 LIQUIDATION BECAUSE ALL THAT THE LIQUIDATOR IS
23 DOING IS MAKING A SUMMARY DETERMINATION, RIGHT?

24 MR. MORRIS: OBJECTION. ASKED AND
25 ANSWERED.

1 MISS LEAHY: I DID NOT ASK THAT
2 QUESTION BEFORE.

3 MR. MORRIS: YOU HAD ASKED A FORM
4 OF THIS QUESTION PROBABLY 20 TIMES.

5 A. THE DETERMINATION CAN CHANGE, YES.
6 BY MISS LEAHY:

7 Q. YES. SO THEREFORE YOU CANNOT SAY
8 THE MINUTE A DETERMINATION IS MADE, WHICH HAS TO
9 BE MADE WITHIN THE FIRST 28 DAYS OF THE COMPANY
10 GOING INTO OFFICIAL LIQUIDATION, THAT FROM THAT
11 POINT ON THE JUDICIAL PROCEEDING IS SOLELY FOR THE
12 BENEFIT OF THE SHAREHOLDERS?

13 MR. MORRIS: OBJECTION. ASKED AND
14 ANSWERED.

15 A. WELL, IT IS UNTIL IT IS CHANGED.

16 BY MISS LEAHY:

17 Q. OKAY. I WANT THEN TO UNDERSTAND
18 WHAT YOU ARE SAYING SHOULD HAPPEN IN THE CONTEXT
19 OF RECOGNITION PROCEEDINGS, RIGHT? I KNOW YOU
20 PRACTICE IN INSOLVENCY, RESTRUCTURING, FRAUD AND
21 NO DOUBT YOU HAD TO APPLY OR GET ASSISTANCE FROM
22 FOREIGN LAWYERS TO APPLY IN DIFFERENT
23 JURISDICTIONS FOR RECOGNITION UNDER THE MODEL LAW,
24 THAT IS RIGHT?

25 A. YES.

1 Q. ARE YOU SAYING THAT NO CAYMAN
2 COMPANY IN SOLVENT LIQUIDATION COULD EVER MAKE A
3 SUCCESSFUL APPLICATION FOR RECOGNITION UNDER THE
4 MODEL LAW?

5 A. I DO NOT THINK THAT IS REALLY A
6 QUESTION FOR ME BECAUSE I THINK THAT IS A QUESTION
7 FOR WHICHEVER COURT IS DETERMINING THE
8 APPLICATION.

9 MR. MORRIS: I AM JUST GOING TO
10 BELATEDLY OBJECT ON THE GROUNDS THAT THIS IS
11 BEYOND THE SCOPE OF HER OPINIONS AS SET FORTH IN
12 HER DECLARATION.

13 BY MISS LEAHY:

14 Q. IS EVERY SINGLE SOLVENT CAYMAN
15 LIQUIDATION NOT A COLLECTIVE PROCEEDING?

16 A. IT DEPENDS WHAT YOU MEAN BY A
17 COLLECTIVE. I THINK WE HAVE ALREADY AGREED THAT
18 IT IS A COLLECTIVE PROCEEDING, BUT I SAID IT IS A
19 COLLECTIVE PROCEEDING FOR THE BENEFIT OF
20 SHAREHOLDERS.

21 Q. OKAY. PUT THE QUESTION ANOTHER
22 WAY. IS EVERY SOLVENT CAYMAN LIQUIDATION
23 COLLECTIVE PROCEEDING FOR THE BENEFIT EXCLUSIVELY
24 OF THE SHAREHOLDERS?

25 A. IF IT IS SOLVENT, YES.

1 Q. RIGHT. AND WHAT IF THE LIQUIDATOR
2 DETERMINES INITIALLY THAT IT IS INSOLVENT,
3 RIGHT ----

4 A. OKAY.

5 Q. ---- IS THAT A COLLECTIVE
6 PROCEEDING FOR THE BENEFIT OF CREDITORS OR IS IT A
7 COLLECTIVE PROCEEDING FOR THE BENEFIT OF CREDITORS
8 AND SHAREHOLDERS?

9 A. SO IF IT IS INSOLVENT, IT IS FOR
10 THE BENEFIT OF CREDITORS.

11 Q. AND SOLELY AND EXCLUSIVELY FOR THE
12 BENEFIT OF CREDITORS?

13 A. YES.

14 Q. BUT IF THERE IS A SURPLUS, A
15 LIQUIDATOR IS REQUIRED TO PAY THE SURPLUS OVER TO
16 THE STAKEHOLDERS, RIGHT?

17 A. YES, YES.

18 Q. YES. AND IF A LIQUIDATOR MAKES A
19 DETERMINATION THAT THE COMPANY IS INSOLVENT AND
20 GETS CHAPTER 15 RECOGNITION IN THE UNITED STATES,
21 IN YOUR OPINION WOULD HE BE REQUIRED TO APPLY TO
22 THE FOREIGN COURT TO TERMINATE THAT CHAPTER 15
23 PROCEEDING ON THE BASIS THAT HE HAD MADE A NEW
24 DETERMINATION THAT THE COMPANY IS SOLVENT?

25 MR. MORRIS: OBJECTION. IT IS

1 BEYOND THE SCOPE OF THE OPINIONS BEING OFFERED,
2 BUT YOU CAN ANSWER.

3 A. IF THAT HAPPENED ON ONE OF MY CASES
4 I WOULD ADVISE THE LIQUIDATOR TO ASK HIS OR HER US
5 LAWYERS FOR ADVICE ON THAT QUESTION.

6 BY MISS LEAHY:

7 Q. IF YOU HAD RECEIVED ADVICE FROM THE
8 US LAWYER THAT A COLLECTIVE PROCEEDING WAS ONLY A
9 COLLECTIVE PROCEEDING FOR THE BENEFIT OF
10 SHAREHOLDERS, DO YOU THINK THE LIQUIDATOR WOULD BE
11 UNDER AN OBLIGATION AS A MATTER OF CAYMAN LAW TO
12 APPLY FOR THE DISMISSAL OF THE CHAPTER 15
13 PROCEEDING IN THE US?

14 MR. MORRIS: SAME OBJECTION.

15 A. DO YOU MEAN SHAREHOLDERS OR
16 CREDITORS IN THAT QUESTION?

17 BY MISS LEAHY:

18 Q. AT THIS STAGE IN TIME YOU ARE
19 SAYING IT IS FOR THE BENEFIT OF SHAREHOLDERS
20 EXCLUSIVELY?

21 A. YES. BUT YOU SAID IF THE
22 LIQUIDATOR HAD RECEIVED ADVICE FROM HIS OR HER US
23 LAWYERS.

24 Q. I AM SORRY, I DID MEAN CREDITORS,
25 YOU ARE ABSOLUTELY RIGHT. I AM GETTING MYSELF IN

1 KNOTS. YOU ARE ABSOLUTELY RIGHT, YES.

2 A. WELL, YOU KNOW, I WOULD TELL THE
3 LIQUIDATOR TO FOLLOW HIS OR HER US LAWYERS' ADVICE
4 IN THAT SITUATION. I WOULD NOT CONSIDER IT TO BE
5 A QUESTION FOR ME. OBVIOUSLY I WOULD WORK CLOSELY
6 WITH THE LIQUIDATOR AROUND THE US LAWYERS, BUT ON
7 THOSE MATTERS I WOULD DEFER TO US COUNSEL.

8 Q. OKAY. WHAT IF THERE WAS STILL
9 ASSETS IN THE UNITED STATES TO REALISE FOR THE
10 BENEFIT OF THE SHAREHOLDERS, WHAT IS THE
11 LIQUIDATOR GOING TO DO IN THAT SITUATION? WHAT
12 ARE YOU GOING TO ADVICE HIM TO DO?

13 A. I AM NOT GOING TO ADVICE HIM. I AM
14 GOING TO TELL HIM TO SEEK US COUNSEL'S ADVICE.

15 Q. WHY DO YOU NORMALLY RECOMMEND TO A
16 LIQUIDATOR -- YOU ARE VERY EXPERIENCED IN
17 INSOLVENCY LAW, SO WHY DO YOU RECOMMEND NORMALLY
18 TO YOUR LIQUIDATOR CLIENT THAT HE OR SHE SHOULD GO
19 TO THE US OR ANOTHER JURISDICTION TO GET
20 RECOGNITION? WHY DO YOU DO THAT?

21 A. IT IS OBVIOUSLY BECAUSE THERE ARE
22 ASSETS THERE OR INFORMATION OR WHATEVER THAT YOU
23 NEED TO GET FROM ----

24 Q. AND THAT IS THE MOST ECONOMIC WAY
25 OF DOING IT, IS IT NOT?

1 A. YES.

2 Q. YES. SO YOU ARE SAYING THAT,
3 BASICALLY, ANY COMPANY THAT EVEN IS TEMPORARILY IN
4 SOLVENT LIQUIDATION IN THE CAYMAN ISLANDS CANNOT
5 USE THE UNCITRAL MODEL LAW TO GO TO NEW YORK,
6 POTENTIALLY ANYWHERE I THINK FROM WHAT YOU ARE
7 SAYING, TO COLLECT IN THE ASSETS OF THE ESTATE?

8 MR. MORRIS: OBJECTION TO THE FORM
9 OF THE QUESTION.

10 A. I AM NOT SAYING THAT, BECAUSE THAT
11 IS BEYOND THE SCOPE OF MY DECLARATION AND IT IS
12 BEYOND THE SCOPE OF MY EXPERTISE. I ACT FOR
13 CAYMAN LIQUIDATORS AND WHEN THERE ARE ISSUES
14 REGARDING RECOGNITION IN FOREIGN JURISDICTIONS OR
15 ASSETS IN FOREIGN JURISDICTIONS, THEN I WILL TELL
16 THEM TO SEEK ADVICE FROM PROPERLY QUALIFIED
17 LAWYERS IN THE RELEVANT JURISDICTION. I WOULD NOT
18 BE THE ONE ADVISING THEM ON WHAT STEPS ARE AROUND
19 OR WHAT IS AVAILABLE IN THE US, OR ANY
20 JURISDICTION OUTSIDE CAYMAN.

21 Q. HAVE YOU PREVIOUSLY EVER, THROUGH
22 YOUR FOREIGN CO-COUNSEL, SOUGHT RECOGNITION IN
23 ANOTHER JURISDICTION OF A SOLVENT CAYMAN COMPANY?

24 A. OF THE LIQUIDATORS OF A SOLVENT
25 CAYMAN COMPANY?

1 Q. YES. I AM SORRY, YES.

2 A. I DO NOT THINK SO, NO, NO.

3 Q. ARE YOU FAMILIAR WITH THE ASCOT
4 FUND CASE?

5 A. I HAVE HEARD OF IT.

6 Q. THAT WAS A SOLVENT LIQUIDATION.

7 A. IF YOU SAY SO. I WOULD NEED TO GO
8 BACK AND ----

9 Q. TAKE IT FROM ME FOR NOW. I DO NOT
10 THINK THAT WILL PROVE TO BE CONTROVERSIAL.

11 A. OKAY.

12 Q. THAT IS A CASE WHERE CHAPTER 15
13 RECOGNITION WAS APPLIED FOR SUCCESSFULLY?

14 A. OKAY.

15 Q. DOES THAT SURPRISE YOU AT ALL?

16 A. IT DOES NOT -- I MEAN, THIS IS WAY
17 BEYOND THE SCOPE OF MY -- I HAVE SAID THIS
18 ALREADY, IT IS BEYOND THE SCOPE OF MY DECLARATION.
19 IT IS BEYOND THE SCOPE OF MY EXPERTISE. LEAVING
20 THAT TO ONE SIDE, IT DOES NOT SURPRISE ME THAT
21 MUCH BECAUSE I THINK, YOU KNOW, FOR A CERTAIN
22 PERIOD THE COURTS WERE NOT SCRUTINIZING THE
23 RECOGNITION APPLICATIONS UNDER THE MODEL LAW AND A
24 VERY BROAD APPROACH WAS BEING TAKEN. NOW CERTAIN
25 COURTS ARE TAKING A NARROWER APPROACH. THAT IS MY

1 OVERALL IMPRESSION, BUT I AM ONLY QUALIFIED TO
2 ADVISE ON CAYMAN LAW. AS YOU KNOW, CAYMAN HAS NOT
3 ADOPTED THE MODEL LAW. SO THAT IS MY OWN
4 IMPRESSION, BUT I AM NOT SURE ----

5 Q. IN THE TCA CASE YOU DID NOT
6 HESITATE TO GIVE YOUR OPINIONS ON THE MEANING OF
7 THE DEFINITION WE ARE NOW LOOKING AT, OKAY?
8 I MEAN, I CAN SHOW YOU OTHER SECTIONS. DO YOU
9 WANT TO SEE SOME MORE OF YOUR -- IS THIS IT? IF
10 YOU GO TO PAGE 7, PARAGRAPH 18: "THE WINDING UP
11 PROCEEDING IS 'COLLECTIVE' IN NATURE IN THAT IT
12 PROVIDES A MECHANISM FOR THE RESOLUTION OF THE
13 CLAIMS OF ALL THE CREDITORS AND SHAREHOLDERS OF
14 THE DEBTOR, AND CLAIMS TOGETHER RATHER THAN MERELY
15 THE RESOLUTION OF A TWO-PARTY DISPUTE."

16 A. YES.

17 Q. YES?

18 A. YES.

19 Q. AT 19, WE HAVE SEEN ALREADY IT IS A
20 JUDICIAL PROCEEDING?

21 A. MMM-HMM.

22 Q. AT 20: "ON THE WHOLE, THE WINDING
23 UP PROCEEDING IS DESIGNED TO BENEFIT CREDITORS AND
24 SHAREHOLDERS ON A COLLECTIVE BASIS."

25 A. YES.

1 Q. CREDITORS AND A SHAREHOLDERS ON A
2 COLLECTIVE BASIS?

3 A. YES, BECAUSE IT WAS OF DOUBTFUL
4 SOLVENCY.

5 Q. IT WAS DOUBTFUL SOLVENCY, I SEE.
6 BUT AT SOME POINT IT WAS GOING TO BE SOLVENT OR
7 INSOLVENT, RIGHT?

8 A. YES.

9 Q. A COMPANY DOES NOT REMAIN OF
10 DOUBTFUL SOLVENCY FOR THE ENTIRE LIQUIDATION
11 PROCESS. AT SOME POINT EVERYTHING WILL
12 CRYSTALLISED, WILL IT NOT?

13 A. YES.

14 Q. SO WHAT ARE YOU SAYING, THAT YOU
15 THINK YOU SHOULD ONLY BE ABLE TO GET CHAPTER 15
16 RECOGNITION IF IT IS DESIGNED TO BENEFIT BOTH THE
17 CREDITORS AND THE SHAREHOLDERS, OR JUST THE
18 CREDITORS, BUT YOU SHOULD NOT EVER GET CHAPTER 15
19 RECOGNITION IF IT IS DESIGNED SOLELY TO BENEFIT
20 THE SHAREHOLDERS?

21 MR. MORRIS: OBJECTION. BEYOND THE
22 SCOPE.

23 A. THAT IS WAY BEYOND THE SCOPE OF MY
24 DECLARATION. IT IS BEYOND THE SCOPE OF MY
25 EXPERTISE. IT IS NOT REALLY SOMETHING THAT I HAVE

1 A PERSONAL VIEW ON ONE WAY OR THE OTHER, YOU KNOW,
2 WHEN CHAPTER 15 SHOULD BE AVAILABLE.

3 BY MISS LEAHY:

4 Q. IN PARAGRAPH 20, YOU DO NOT MAKE
5 ANY REFERENCE -- I MEAN, I CANNOT FIND A REFERENCE
6 TO DOUBTFUL SOLVENCY ANYWHERE IN THIS. YOU DID
7 NOT SEEM TO NEED TO DRAW IT TO THE COURT'S
8 ATTENTION IN THIS CASE THAT IT WAS OF DOUBTFUL
9 SOLVENCY. YOU CAN READ IT IF YOU WANT TO, AND WE
10 MIGHT HAVE A BREAK WHEN YOU CAN DO THAT, BUT LOOK
11 AT PARAGRAPH 20, WHAT YOU SAY THERE IS NOT SUBJECT
12 TO THE CAVEAT THAT THIS IS A COMPANY WHERE THE
13 DETERMINATION IS ONE OF DOUBTFUL SOLVENCY.

14 MR. MORRIS: OBJECTION.

15 ARGUMENTATIVE.

16 A. NO, IT IS NOT STATED IN THERE, BUT
17 IT DOES NOT NEED TO BE STATED BECAUSE IT IS
18 BECAUSE IT IS OF DOUBTFUL SOLVENCY THAT ALL OF
19 THIS IS TRUE.

20 BY MISS LEAHY:

21 Q. BUT YOU CRITICISED MR. ROBINSON FOR
22 NOT MENTIONING THE FACT THAT THE COMPANY WAS
23 SOLVENT?

24 A. YES, BECAUSE HE THEN, YOU KNOW,
25 WENT ON TO TALK ABOUT CREDITORS' CLAIMS AND, YOU

1 KNOW, IT BEING FOR THE BENEFIT OF CREDITORS. WE
2 CAN LOOK -- YOU KNOW, THERE WERE OTHER ASPECTS OF
3 HIS DECLARATION AND MR. COWAN'S DECLARATION ----

4 Q. YES, WE CAN LOOK AT THOSE IN DUE
5 COURSE?

6 A. ---- THAT WERE MISLEADING IN THE
7 CONTEXT OF A SOLVENT COMPANY.

8 Q. YOU SAID THAT YOU WERE NOT ALLEGING
9 THAT THEY HAD DELIBERATELY SOUGHT TO MISLEAD THE
10 COURT?

11 A. NO.

12 Q. WHAT ARE YOU ALLEGING, THOUGH?

13 A. JUST THAT THOSE CERTAIN PARAGRAPHS
14 THAT I IDENTIFIED ARE MISLEADING. I AM NOT
15 ALLEGING ANYTHING MORE THAN THAT.

16 Q. OKAY. WOULD YOU NOT CONSIDER THAT
17 IT IS MISLEADING TO SAY, AS YOU SAID IN YOUR
18 AFFIDAVIT, THAT CREDITORS ARE BARRED FROM
19 PARTICIPATING IN SOLVENT LIQUIDATIONS?

20 A. NO.

21 Q. EVEN THOUGH WE HAVE DISCUSSED
22 VARIOUS MECHANISMS, BECAUSE I HAVE JUST SEEN IT IN
23 YOUR AFFIDAVIT, WHEREBY CREDITORS CAN PARTICIPATE
24 IN A SOLVENT LIQUIDATION?

25 MR. MORRIS: OBJECTION TO THE FORM

1 OF THE QUESTION. ARGUMENTATIVE.

2 A. I DO NOT WANT TO GO BACK OVER
3 EVERYTHING THAT WE HAVE ALREADY DISCUSSED, BUT
4 I THINK THE ONLY MECHANISMS THAT WE HAVE
5 IDENTIFIED ARE THAT THE LIQUIDATOR CAN SEND THEM A
6 PROOF OF DEBT AND IF BOTH THE LIQUIDATOR AND THE
7 CREDITOR AGREE, THEIR DISPUTED CLAIM CAN BE
8 RESOLVED THROUGH THE PROOF OF DEBT PROCESS, BUT
9 THEY DO NOT HAVE TO BE, AND THAT ACCORDING TO THE
10 ACT THEY CAN BRING AN APPLICATION FOR THE
11 LIQUIDATOR'S REMOVAL BUT THEIR VIEWS ON THAT
12 APPLICATION WOULD BE GIVEN NO WEIGHT. SO I DO NOT
13 ACCEPT THAT SAYING THEY ARE BARRED WHEN THOSE ARE
14 THE ONLY TWO THINGS THAT WE HAVE IDENTIFIED THAT
15 THEY CAN DO IS MISLEADING.

16 BY MISS LEAHY:

17 Q. THE ONLY THING THAT CREDITORS
18 REALLY CARE ABOUT IS GETTING PAID, IS IT NOT, IF
19 WE ARE HONEST ABOUT IT?

20 A. YES.

21 Q. AND THEY DO GET TO ENGAGE WITH THE
22 LIQUIDATOR TO ENSURE THEY GET PAID IN ONE WAY OR
23 ANOTHER, DO THEY NOT, IN A SOLVENT LIQUIDATION?

24 MR. MORRIS: OBJECTION TO THE FORM
25 OF THE QUESTION.

1 A. YES, IN THE SAME WAY THAT THEY
2 WOULD WITH A COMPANY THAT WAS NOT IN LIQUIDATION
3 AT ALL.

4 BY MISS LEAHY:

5 Q. BUT IT IS WITH THE LIQUIDATOR?

6 A. YES.

7 Q. YES. AND ALSO, AS WE HAVE
8 IDENTIFIED, THE LIQUIDATION IS A TERMINAL PROCESS,
9 SO IT IS ABOUT WINDING DOWN THE COMPANY TO PAY
10 YOUR DEBTS, RIGHT?

11 A. YES.

12 Q. BUT YOU COULD VERY, VERY FREQUENTLY
13 HAVE A COMPANY THAT IS DEEMED UNABLE TO PAY ITS
14 DEBTS BECAUSE IT HAS NOT PAID A SINGLE INVOICE ON
15 TIME BUT IS BALANCE SHEET SOLVENT AND IN FACT ABLE
16 TO PAY ALL ITS CREDITORS IN FULL WITH STATUTORY
17 INTEREST IN A MASSIVE, MASSIVE DIVIDEND TO
18 SHAREHOLDERS. THAT IS VERY POSSIBLE, IS IT NOT?

19 A. YES.

20 Q. I JUST WANT TO CHECK THE TIME.
21 I THINK WE SHOULD PROBABLY HAVE A SHORT BREAK.
22 FIFTEEN MINUTES? IS THAT ENOUGH TIME FOR SNACKS?

23 A. YES.

24 MR. MORRIS: IT IS 1.33. WE WILL
25 BE BACK AT 1.45?

1 MISS LEAHY: LET US SAY 1.55.

2 (A SHORT BREAK FROM 1.33 P.M. TO 1.55 P.M.)

3 THE COURT REPORTER: WE ARE BACK ON
4 THE RECORD AT 13.55.

5 BY MISS LEAHY:

6 Q. I WANT TO MOVE ON FROM COLLECTIVE
7 JUDICIAL PROCEEDINGS TO ANOTHER PART OF THE TEST,
8 IF YOU COULD LOOK AGAIN AT THE BANKRUPTCY CODE,
9 AND SUBSECTION (23), PLEASE?

10 A. OKAY.

11 Q. WE HAVE ADDRESSED JUDICIAL
12 PROCEEDING, WE HAVE DISCUSSED AND NOT AGREED ON
13 OTHER PARTS OF THE DEFINITION, BUT I NOW WANT TO
14 LOOK AT THE PHRASE "UNDER A LAW RELATING TO
15 INSOLVENCY".

16 A. MMM-HMM.

17 Q. PART 5 OF THE COMPANIES ACT IS A
18 PART THAT DEALS WITH THE WINDING UP OF COMPANIES?

19 A. YES.

20 Q. AND ALL OFFICIAL LIQUIDATIONS,
21 SOLVENT OR INSOLVENT, MUST START LIFE OR MUST BE
22 INITIATED UNDER PART 5 OF COMPANIES ACT?

23 A. YES.

24 Q. AND PART 5 OF THE ACT IS A LAW
25 RELATING TO INSOLVENCY, IS IT NOT?

1 A. WELL, THAT IS I THINK BEYOND THE
2 SCOPE OF MY EXPERTISE AND BEYOND THE SCOPE OF MY
3 OPINION, BECAUSE THAT IS, YOU KNOW, APPLYING
4 SECTION 23.

5 Q. IN THE TCA GLOBAL CASE YOU OPINED
6 THAT THE PROCEEDING WAS UNDER A LAW RELATING TO
7 INSOLVENCY. DO YOU WANT TO HAVE A LOOK AT THAT?

8 A. YES, OKAY. WHICH PARAGRAPH IS IT?

9 Q. I WILL HAVE TO FIND IT. IF YOU GO
10 TO PARAGRAPH 16 ON PAGE 6, IF YOU GO TO THE LAST
11 SENTENCE.

12 A. OKAY.

13 Q. SO IN THAT CASE YOU CONSIDERED
14 YOURSELF TO HAVE APPROPRIATE EXPERTISE TO OPINE ON
15 THAT QUESTION, OKAY?

16 A. YES.

17 Q. WHAT HAS CHANGED SINCE YOU MADE
18 THAT AFFIDAVIT?

19 A. WELL, TCA IS A VERY DIFFERENT CASE.
20 TCA IS A COMPANY THAT WAS PUT INTO LIQUIDATION
21 FOLLOWING A CREDITORS' WINDING UP PETITION AND WAS
22 THEN CERTIFIED BY THE LIQUIDATORS TO BE OF
23 DOUBTFUL SOLVENCY, SO ----

24 Q. CAN I JUST PAUSE YOU THERE, BECAUSE
25 I THINK WE MAY BE MILES APART. I KNOW THAT THE

1 FACTS ARE DIFFERENT. I AM JUST ASKING WHAT HAS
2 CHANGED IN TERMS OF YOUR EXPERIENCE, THAT YOU ONCE
3 THOUGHT YOU COULD OPINE ON THIS QUESTION AND NOW
4 YOU NO LONGER THINK YOU CAN OPINE ON THIS
5 QUESTION?

6 MR. MORRIS: OBJECTION TO THE FORM
7 OF THE QUESTION. YOU CAN ANSWER.

8 A. I MEAN, BOTH IN TCA AND IN THIS
9 CASE I WAS GUIDED BY MY US ATTORNEYS AS TO WHAT
10 WAS APPROPRIATE TO INCLUDE IN MY DECLARATION AND
11 WHAT WAS NOT APPROPRIATE TO INCLUDE.

12 BY MISS LEAHY:

13 Q. HOW WERE YOU SO GUIDED? IN YOUR
14 INSTRUCTIONS?

15 A. YES.

16 Q. RIGHT. SO DID YOUR WRITTEN
17 INSTRUCTIONS TO YOU ASKING YOU TO OPINE ON CERTAIN
18 THINGS SAY WE DO NOT WISH YOU TO OPINE ON THE
19 FOLLOWING MATTERS?

20 A. NO. I HAD A WRITTEN LETTER OF
21 INSTRUCTIONS. I AM NOT SURE TO WHAT EXTENT I AM
22 SUPPOSED TO TALK ABOUT MY CONVERSATIONS WITH ----

23 Q. THE SCOPE OF THE INSTRUCTIONS THAT
24 ARE PRIVILEGED, AND I AM SURE THERE WILL BE
25 INTERVENTIONS.

1 A. ---- PACHULSKI. YOU KNOW, I HAD A
2 WRITTEN LETTER OF INSTRUCTIONS FROM THEM AND
3 SUBSEQUENTLY A CALL WITH THEM TO DISCUSS THE SCOPE
4 OF THE OPINION. THEY CONFIRMED MY UNDERSTANDING,
5 WHICH WAS THAT MY ROLE WAS SOLELY TO OPINE ON THE
6 ISSUES THAT ARE SET OUT AT PARAGRAPH 9 OF MY
7 DECLARATION WHICH RELATE TO THE CAYMAN PROCESS AND
8 THAT MY ROLE WAS NOT TO TAKE THE FURTHER STEP OF
9 SEEKING TO OPINE ON WHETHER THE PROCESS WAS A
10 FOREIGN PROCEEDING.

11 Q. OKAY. YOU ARE A HIGHLY QUALIFIED
12 LAWYER AND YOU HAVE EXPERIENCE IN INSOLVENCY AND
13 RESTRUCTURING AND THE MODEL LAW, WE ALREADY
14 ESTABLISHED THAT.

15 A. YES.

16 Q. AND WE HAVE SEEN A DECLARATION THAT
17 YOU HAVE MADE IN OTHER PROCEEDINGS WHERE YOU DID
18 CONSIDER THAT YOU HAD SUFFICIENT QUALIFICATIONS
19 AND EXPERIENCE TO SAY WHETHER SOMETHING WAS OR WAS
20 NOT A LAW RELATING TO INSOLVENCY, OKAY? SO I WANT
21 TO NOW ASK YOU SOME QUESTIONS, AND OBJECTION MAY
22 BE TAKEN IN DUE COURSE TO THOSE QUESTIONS, BUT
23 I AM GOING TO ASK YOU SOME QUESTIONS ABOUT YOUR
24 OPINION AS A CAYMAN LAWYER ON WHETHER THE CAYMAN
25 PROCEEDING IS A PROCEEDING UNDER A LAW RELATING TO

1 INSOLVENCY.

2 A. OKAY.

3 Q. I JUST WANT TO START AGAIN WITH IS
4 PART 5 OF THE ACT A LAW RELATING TO INSOLVENCY?

5 A. WELL, IT IS A PART OF THE COMPANIES
6 ACT AND THE COMPANIES ACT IS A LAW WHICH DEALS
7 WITH ALL ASPECTS OF THE LIFE CYCLE OF A COMPANY IN
8 THE CAYMAN ISLANDS, INCLUDING THEIR INSOLVENCY.

9 Q. YES. OKAY. COULD I ASK THE
10 QUESTION AGAIN? IS PART 5 OF THE ACT A LAW
11 RELATING TO INSOLVENCY?

12 MR. MORRIS: OBJECTION. ASKED AND
13 ANSWERED.

14 MISS LEAHY: NO, IT WAS NOT
15 ANSWERED.

16 MR. MORRIS: YOU DO NOT THINK IT
17 WAS. I AM JUST GOING TO PRESERVE MY OBJECTION.

18 MISS LEAHY: I AM NOT USED TO THESE
19 OBJECTIONS.

20 MR. MORRIS: YES.

21 A. I MEAN, I KNOW I HAVE READ FOR
22 BACKGROUND, YOU KNOW, VARIOUS DECISIONS ON WHAT
23 DOES AND DOES NOT CONSTITUTE A LAW RELATING TO
24 INSOLVENCY AND I KNOW THERE IS A DEBATE ABOUT, YOU
25 KNOW, WHETHER IT HAS TO BE A SPECIFIC LAW THAT

1 JUST DEALS WITH INSOLVENT COMPANIES OR WHETHER
2 SOLVENT AND INSOLVENT ARE MIXED UP IN THE SAME LAW
3 OR THE SAME SECTION AND WHETHER THAT MAKES A
4 DIFFERENCE. HONESTLY, I DO NOT THINK IT IS
5 SOMETHING ON WHICH I AM QUALIFIED TO OPINE.

6 BY MISS LEAHY:

7 Q. BECAUSE?

8 A. WELL, BECAUSE IT IS A QUESTION OF
9 US LAW, AND I AM NOT A US LAWYER.

10 Q. BUT YOU ARE A LAWYER AND I AM
11 ASKING YOU ----

12 A. I AM A LAWYER. I AM A CAYMAN
13 LAWYER AND I CAN OPINE ON THE MEANING OF SECTIONS
14 OF CAYMAN LEGISLATION, BUT ----

15 Q. THE US JUDGE I AM SURE WILL BE VERY
16 INTERESTED TO KNOW WHETHER A CAYMAN LAWYER THINKS
17 THAT PART 5 OF THE ACT IS A LAW RELATING TO
18 INSOLVENCY. THAT IS OUR POSITION, AND THAT IS WHY
19 I AM GOING TO CONTINUE TO ASK YOU QUESTIONS ABOUT
20 IT.

21 A. I MEAN, PARTS OF ITS ARE AND PARTS
22 OF IT ARE NOT.

23 Q. PARTS OF PART 5 ARE AND PARTS OF 5
24 ARE NOT, IS THAT WHAT YOU ARE SAYING?

25 A. YES.

1 Q. RIGHT, I SEE. LET US GO THROUGH A
2 FEW HYPOTHESES.

3 A. OKAY.

4 Q. A CREDITOR PRESENTS A PETITION FOR
5 THE WINDING UP OF A CAYMAN COMPANY ON THE BASIS
6 THAT IT IS UNABLE TO PAY ITS DEBTS AS THEY FALL
7 DUE, THE COURT MAKES A WINDING UP ORDER, WAS THE
8 WINDING UP ORDER MADE UNDER A LAW RELATING TO
9 INSOLVENCY?

10 MR. MORRIS: OBJECTION TO THE FORM
11 OF THE QUESTION TO THE EXTENT THAT IT IS CALLING
12 FOR THE INTERPRETATION OF US LAW, BUT OTHERWISE
13 YOU CAN ANSWER.

14 A. SO WE ARE TALKING ABOUT A CREDITOR
15 OF A CAYMAN COMPANY?

16 BY MISS LEAHY:

17 Q. YES.

18 A. IT IS CAYMAN COMPANY THAT IS BEING
19 WOUND UP ON A CREDITOR'S PETITION?

20 Q. ALWAYS IN CAYMAN, YES.

21 A. YES. SO YES.

22 Q. YES. TWO WEEKS LATER, SAME FACTS,
23 THE OFFICIAL LIQUIDATOR MAKES AN ORDER 8
24 DETERMINATION AND DETERMINES THAT THE COMPANY IS
25 INSOLVENT.

1 A. MMM-HMM.

2 Q. IN THAT SITUATION THE OFFICIAL
3 LIQUIDATION IS AN INSOLVENT LIQUIDATION, CORRECT?

4 A. YES.

5 Q. SORRY IT IS THE SAME QUESTION
6 AGAIN, AND YOU PROBABLY WILL HAVE THE SAME ANSWER
7 THROUGHOUT, BUT WAS THE WINDING UP ORDER MADE
8 UNDER A LAW RELATING TO INSOLVENCY?

9 A. YES.

10 Q. RIGHT. SAME FACTS, BUT RATHER THAN
11 MAKE A SOLVENCY DETERMINATION, THE OFFICIAL
12 LIQUIDATOR MAKES A SOLVENCY DECLARATION, RIGHT?
13 IN THIS SCENARIO THE OFFICIAL LIQUIDATION IS A
14 SOLVENT LIQUIDATION?

15 A. OKAY.

16 Q. WAS THE WINDING UP ORDER MADE UNDER
17 A LAW RELATING TO INSOLVENCY?

18 A. THAT IS AN INTERESTING QUESTION, IS
19 IT NOT? WELL, I THINK IT IS INTERESTING. IT IS
20 QUITE UNLIKELY AS WELL, BECAUSE YOU HAVE GOT
21 COMPANY BEING WOUND UP ON A CREDITOR'S PETITION
22 BUT THEN THE LIQUIDATOR CERTIFYING IT AS SOLVENT.

23 Q. I AM NOT INTERESTED IN THE
24 LIKELIHOOD OF IT.

25 A. OKAY.

1 Q. I AM INTERESTED IN MY HYPOTHESIS.

2 A. OKAY.

3 Q. I WANT TO KNOW WHETHER THE WINDING
4 UP ORDER MADE ON THE CREDITOR'S PETITION WAS MADE
5 UNDER A LAW RELATING TO INSOLVENCY.

6 A. WELL, A WINDING UP ORDER IN THIS
7 CASE WAS MADE UNDER ----

8 Q. I AM NOT TALKING ABOUT THIS CASE.
9 I AM ----

10 A. THE HYPOTHETICAL CASE?

11 Q. YES, SORRY.

12 A. THIS CASE THAT WE ARE TALKING
13 ABOUT, THIS HYPOTHETICAL CASE.

14 MISS LEAHY: DO YOU HAVE SOMETHING
15 YOU WOULD LIKE TO CONTRIBUTE TO THE DEPOSITION?

16 MR. JOHNSTONE: NO, NO, I WAS
17 LAUGHING AT THE EXCHANGE, WHICH I THOUGHT WAS
18 FUNNY, AND I LAUGHED.

19 MISS LEAHY: OKAY, FINE. IT IS
20 JUST THAT SOMETIMES IT CAN BE QUITE DIFFICULT FOR
21 THE TRANSCRIPT.

22 MR. JOHNSTONE: I AM SORRY.

23 A. OKAY, THIS IS A WINDING UP ORDER
24 ----

25 MR. MORRIS: I AM SORRY, WHERE ARE

1 YOU POINTING TO?

2 A. SORRY, IN THE COMPANIES ACT,

3 EXHIBIT 2. SO, A WINDING UP ORDER MADE UNDER
4 SECTION 92D ON THE GROUND THAT THE COMPANY IS
5 UNABLE TO PAY ITS DEBTS, SO IN MY OPINION, TO THE
6 EXTENT THAT MY OPINION IS RELEVANT ----

7 BY MISS LEAHY:

8 Q. ALL CAVEATS HEARD AND EXCEPTED BY
9 THE WAY.

10 A. ---- THE WINDING UP ORDER IN THIS
11 HYPOTHETICAL CASE IS MADE UNDER A LAW RELATING TO
12 INSOLVENCY, BUT QUERY WHETHER IN THE UNUSUAL TURN
13 OF EVENTS THAT THE LIQUIDATOR THEN CERTIFIES IT AS
14 SOLVENT, WHETHER IT IS THEN A PROCEEDING UNDER A
15 LAW RELATING TO INSOLVENCY, BECAUSE IT IS THEN
16 PROCEEDING AS A SOLVENT LIQUIDATION, AND AS WE
17 HAVE ALREADY DISCUSSED AT LENGTH, THE CREDITORS
18 HAVE ONLY A VERY, VERY LIMITED ROLE TO PLAY, SO
19 WHETHER IT IS A NOW A PROCEEDING UNDER A LAW
20 RELATING TO INSOLVENCY I DO NOT KNOW. I WOULD SAY
21 NO. BUT THIS IS KIND OF WHAT WE DISCUSSED AT THE
22 START. SO THERE IS THE GATEWAY BY WHICH THE
23 COMPANY GETS INTO THE INSOLVENCY PROCEEDING AND,
24 YOU KNOW, IT CAN BE AN OFFICIAL -- YOU KNOW, IT
25 CAN BE A WINDING UP PETITION OR IT CAN BE

1 VOLUNTARY THAT GOES UNDER SUPERVISION. SO WE HAVE
2 GOT THE GATEWAY, WHICH IS ONE THING, AND THEN WE
3 HAVE THE PROCEEDING ITSELF, WHICH DEPENDS ON THE
4 SOLVENCY DETERMINATION.

5 Q. OKAY. AT THE VERY START I THINK WE
6 ESTABLISHED A LOT OF COMMON GROUND -----

7 A. YES.

8 Q. ----- AND THE NUMEROUS PROVISIONS OF
9 PART 5 OF THE COMPANIES ACT THAT APPLY TO BOTH
10 SOLVENT AND INSOLVENT LIQUIDATIONS, DID WE NOT?

11 A. YES.

12 Q. AND I THINK WE ESTABLISHED FAR MORE
13 PROVISIONS OF THE ACT THAT APPLIED TO BOTH FORMS
14 OF INSOLVENCY THAN WE FOUND PROVISIONS OF THE ACT
15 THAT ONLY APPLIED TO ONE OR OTHER FORM OF
16 PROCEEDING?

17 MR. MORRIS: OBJECTION TO THE FORM
18 OF THE QUESTION.

19 A. THAT IS -----

20 BY MISS LEAHY:

21 Q. BOTH FORMS OF LIQUIDATION. SO WE
22 HAVE ESTABLISHED FAR MORE PROVISIONS OF THE ACT
23 THAT APPLIED TO BOTH FORMS OF THE LIQUIDATION THAN
24 WE FOUND PROVISIONS OF THE ACT THIS ONLY APPLIED
25 TO ONE OR OTHER FORM OF PROCEEDING.

1 MR. MORRIS: OBJECTION TO THE FORM
2 OF THE QUESTION.

3 A. YES, I MEAN, THERE ARE A LOT OF
4 PROVISIONS THAT APPLY TO BOTH. THERE ARE A LOT OF
5 PROVISIONS THAT APPLY TO BOTH BUT THAT
6 SPECIFICALLY STATE IF IT IS SOLVENT,
7 CONTRIBUTORS. IF IT IS INSOLVENT, CREDITORS.
8 WHETHER THERE ARE MORE OF ONE OR THE OTHER I AM
9 NOT SURE, BUT IT IS HELPFUL FOR US TO GO THROUGH
10 SECTION BY SECTION AND DO A TALLY.

11 BY MISS LEAHY:

12 Q. COME ON! WE WENT THROUGH ----

13 A. YOU WENT THROUGH A FEW THAT YOU
14 PICKED OUT, BUT YES, I ACCEPT THAT THERE ARE A LOT
15 OF ----

16 Q. THIS ENTIRE DECLARATION IS DESIGNED
17 TO SET OUT THE DIFFERENCES BETWEEN A SOLVENT
18 LIQUIDATION AND AN INSOLVENT LIQUIDATION. SO IF
19 YOU HAD IDENTIFIED ANY MORE PROVISIONS THAT WERE
20 HELPFUL TO YOUR ANALYSIS, THAT THERE ARE
21 SIGNIFICANT DIFFERENCES BETWEEN THE TWO FORMS OF
22 PROCEDURE, YOU WOULD HAVE SET THEM OUT IN YOUR
23 DECLARATION, WOULD YOU NOT?

24 MR. MORRIS: OBJECTION.
25 ARGUMENTATIVE.

1 A. YES, I MEAN, I WOULD HAVE SET
2 OUT -- YES, YES, I AGREE.

3 BY MISS LEAHY:

4 Q. ALL YOU WERE ABLE TO SHOW WAS A
5 HANDFUL OF DIFFERENCES BETWEEN THE TWO TYPES OF
6 PROCEDURE?

7 MR. MORRIS: OBJECTION TO THE FORM
8 OF THE QUESTION.

9 A. VERY IMPORTANT DIFFERENCES.

10 BY MISS LEAHY:

11 Q. VERY IMPORTANT DIFFERENCES?

12 A. YES.

13 Q. OKAY, WE WILL NOT GO OVER THAT
14 AGAIN. YOU HAVE GOT THE INSOLVENCY -- SORRY, THE
15 COMPANIES ACT, AND THAT WAS REALLY A SLIP OF THE
16 TONGUE, BECAUSE, AS YOU KNOW, IN ENGLAND WE HAVE
17 THE INSOLVENCY ACT.

18 A. YES.

19 Q. YOU HAVE THE COMPANIES ACT THERE.

20 IF YOU JUST FLICK THROUGH SECTIONS 138-150, WE CAN
21 SEE ALL THE PROVISIONS APPLY TO BOTH FORMS OF
22 PROCEEDING.

23 A. WELL, NO. 138 I THINK DOES, BUT
24 139 AND 140, WHICH ARE ABOUT THE PAYMENT OF DEBTS,
25 THOSE APPLY IN INSOLVENT LIQUIDATION.

1 Q. WHY DOES NOT 139(1) APPLY IN A
2 SOLVENT LIQUIDATION? I AM SORRY, I DO NOT FOLLOW
3 THAT.

4 A. THIS IS, YOU KNOW, THE PROOF OF
5 DEBT PROCEDURE, WHICH IS NOT GENERALLY USED IN A
6 SOLVENT LIQUIDATION. WE HAVE ALREADY LOOKED AT
7 ORDER 16, RULE 1(3). I KNOW THAT A LIQUIDATOR CAN
8 REQUEST A PROOF OF DEBT FOR A DEBT WHOSE EXISTENCE
9 OR AMOUNT IS DISPUTED ----

10 Q. YES.

11 A. ---- IN A SOLVENT LIQUIDATION. BUT
12 YOU KNOW, 139(1) AND ORDER 16 GENERALLY BEING USED
13 FOR ALL DEBTS OF THE COMPANY, THAT IS ONLY THE
14 CASE IN AN INSOLVENT LIQUIDATION.

15 Q. FIRST OF ALL, IT DOES NOT SAY THAT
16 IT ONLY APPLIES TO AN INSOLVENT LIQUIDATION, DOES
17 IT?

18 A. WELL, NO, BUT, I MEAN -- IT DOES
19 NOT SPECIFICALLY SAY INSOLVENT, NO.

20 Q. GO BACK TO SECTION 131. ACTUALLY
21 THIS IS THE EASIEST WAY TO MAKE THIS POINT. 131
22 IS AN APPLICATION FOR A SUPERVISION ORDER. WE
23 ALSO KNOW THAT THE LIQUIDATOR IS REQUIRED TO APPLY
24 UNDER 124 AS WELL IN CERTAIN CIRCUMSTANCES.

25 A. YES.

1 Q. THEN IF YOU GO TO 133, EFFECT OF A
2 SUPERVISION ORDER.

3 A. YES.

4 Q. RIGHT?

5 A. YES.

6 Q. SO AGAIN WHY DOES 139(1) APPLY,
7 BECAUSE IT SEEMS TO ON ITS TERMS, DOES IT NOT, AND
8 THIS IS THE MAIN STATUTE?

9 A. HANG ON, ARE YOU ASKING ME ABOUT
10 133 ----

11 MR. MORRIS: OBJECTION TO THE FORM
12 OF THE QUESTION.

13 A. ---- OR 139?

14 BY MISS LEAHY:

15 Q. 139(1). WHY DOES IT NOT APPLY TO
16 SOLVENT LIQUIDATIONS?

17 A. WELL, IT IS ADMISSIBLE TO PROOF.
18 SO THIS IS TALKING ABOUT THE LIQUIDATOR CALLING
19 FOR PROOFS OF DEBT AND PAYING OUT UNDER SECTION
20 140 PARI PASSU.

21 Q. IT IS NOT TALKING ABOUT PROOF OF
22 DEBT, IS IT? IT IS ABOUT SAYING WHO IS ENTITLED
23 TO MAKE A CLAIM AGAINST THE ESTATE. THAT IS WHAT
24 IT IS SAYING. IT NOT SAYING HOW THEY SHOULD MAKE
25 THAT CLAIM. IT IS SAYING WHO IS ENTITLED TO MAKE

1 A CLAIM.

2 A. YES.

3 Q. SO IT DOES APPLY TO SOLVENT
4 LIQUIDATIONS, DOES IT NOT, BECAUSE A LIQUIDATOR OF
5 A SOLVENT LIQUIDATION HAS TO KNOW WHAT CLASS OF
6 CREDITOR IS ENTITLED TO ACTUALLY MAKE A CLAIM
7 AGAINST THE COMPANY?

8 A. OKAY. WELL, IT APPLIES TO SOLVENT
9 LIQUIDATIONS IN THE SAME WAY THAT IT APPLIES TO
10 THE WORLD TO ANY COMPANY. I MEAN, IT IS JUST
11 SAYING ANY CREDITOR CAN MAKE A CLAIM.

12 Q. YES. I AM SORRY, I DO NOT
13 UNDERSTAND THE DISTINCTION YOU ARE TRYING TO DRAW
14 BETWEEN HOW IT APPLIES TO A SOLVENT LIQUIDATION
15 AND HOW IT APPLIES TO AN INSOLVENT LIQUIDATION?
16 IT APPLIES IN THE SAME WAY TO BOTH, DOES IT NOT?

17 A. I MEAN, I AGREE THAT CREDITORS CAN
18 CLAIM AGAINST THE COMPANY IN A SOLVENT AND AN
19 INSOLVENT LIQUIDATION. IT IS JUST THAT THE PROOF
20 OF DEBT PROCEDURE DOES NOT APPLY IN A SOLVENT
21 LIQUIDATION.

22 Q. IT CAN APPLY, CAN IT NOT?

23 A. IT CAN IN THE CIRCUMSTANCES WE HAVE
24 ALREADY DISCUSSED.

25 Q. AND IT CAN BE DISAPPLIED IN A

1 SOLVENT -- IN AN INSOLVENT LIQUIDATION, AS WE HAVE
2 DISCUSSED?

3 A. YES.

4 Q. YES. I AM NOT GOING TO GO THROUGH
5 ALL OF THESE, BECAUSE WE HAVE SEEN WHAT 133 SAYS?

6 A. YES.

7 Q. YES?

8 A. YES, BUT 133 IS JUST -- IT IS ABOUT
9 THE GATEWAY. SO IT IS SAYING BECAUSE THE EFFECT
10 OF A SUPERVISION ORDER IS THE SAME AS THE EFFECT
11 OF AN ORDER THAT THE COMPANY BE WOUND UP BY THE
12 COURT SO IT BRINGS IT INTO THE SAME POSITION AS IF
13 IT WERE IN OFFICIAL LIQUIDATION, BUT THERE IS
14 STILL A BIG DISTINCTION BETWEEN SOLVENT AND
15 INSOLVENT OFFICIAL LIQUIDATION.

16 Q. IS SECTION 139(1) A LAW RELATING TO
17 INSOLVENCY?

18 A. I MEAN, IN MY OPINION, PROBABLY
19 YES.

20 Q. WHAT ABOUT SECTION 138, WHILE WE
21 ARE ON THAT PAGE?

22 A. WELL, I MEAN, IN MY OPINION IF YOU
23 ARE TALKING ABOUT -- I MEAN, IF YOU ARE TALKING
24 ABOUT AN INSOLVENT COMPANY, PROBABLY YES. IF YOU
25 ARE TALKING ABOUT A SOLVENT COMPANY, PROBABLY NOT.

1 Q. OH MY GOODNESS! SO THE GRANULARITY
2 IS THIS, THAT SOME SECTIONS OF THE ACT YOU SAY ARE
3 LAWS RELATING TO INSOLVENCY BUT SOME SECTIONS OF
4 THE ACT THAT ARE LAWS RELATING TO INSOLVENCY ARE
5 ONLY LAWS RELATING TO INSOLVENCY IF THE COMPANY IS
6 INSOLVENT. IS WHAT YOU ARE SAYING?

7 MR. MORRIS: OBJECTION.
8 ARGUMENTATIVE AND I MOVE TO STRIKE THE PRELIMINARY
9 COMMENT.

10 MR. MCDONALD: SHE CAN ANSWER.

11 A. I MEAN, I AM TRYING TO ANSWER YOUR
12 QUESTIONS. I AM NOT SURE IT IS PARTICULARLY A
13 FRUITFUL LINE OF QUESTIONING, BUT I AM DOING MY
14 BEST.

15 BY MISS LEAHY:

16 Q. WE THINK IT IS A VERY FRUITFUL LINE
17 OF QUESTIONING.

18 MR. MORRIS: WE DO, BY THE WAY.
19 PLEASE STOP THE COMMENTARY WITH MY EXPERT. JUST
20 ASK THE QUESTIONS. JUST ASK THE QUESTIONS.

21 MISS LEAHY: I COULD START TO ----

22 MR. MCDONALD: SHE HAS ----

23 MR. MORRIS: JUST ASK THE
24 QUESTIONS. I KNOW IT IS GETTING FRUSTRATING, BUT
25 LET US FINISH THIS UP.

1 MISS LEAHY: IS IT GETTING
2 FRUSTRATING? RIGHT.

3 MR. MORRIS: IT LOOKS LIKE IT.

4 MISS LEAHY: I THINK THIS IS NOT
5 HELPFUL.

6 MR. MORRIS: I KNOW. SO PLEASE
7 JUST ASK THE QUESTIONS.

8 MISS LEAHY: WE ARE HAVING A VERY
9 RESPECTFUL, POLITE DISCUSSION AND IT WOULD BE
10 HELPFUL IF WE DID NOT HAVE THIS SORT OF
11 INTERVENTION ON A REGULAR BASIS.

12 MR. MORRIS: I AM FORCED TO DEFEND
13 MY EXPERT WHEN THE QUESTIONS BECOME HOSTILE.

14 BY MISS LEAHY:

15 Q. I WANT TO ASK THIS QUESTION AGAIN
16 BECAUSE I REALLY WANT TO UNDERSTAND YOUR EVIDENCE
17 ON THIS POINT AND THE LEVEL OF GRANULARITY THAT
18 YOU SAY SHOULD BE APPLIED TO THE QUESTION OF
19 WHETHER SOMETHING IS LAW RELATING TO INSOLVENCY.
20 YOU SAID THAT YOU THOUGHT SECTION 139 WAS A LAW
21 RELATING TO INSOLVENCY. WHEN I ASKED YOU ABOUT
22 SECTION 138, YOU GAVE A DIFFERENT ANSWER. YOUR
23 ANSWER WAS THAT SECTION 138 WAS A LAW RELATING TO
24 INSOLVENCY IF THE COMPANY WAS INSOLVENT, BUT IT
25 WAS NOT IF THE COMPANY WAS SOLVENT, RIGHT? CAN

1 YOU EXPLAIN THE DIFFERENCE IN YOUR ANSWERS IN
2 RELATION TO 139 AND 138?

3 A. WELL, MY VIEW, AS WE HAVE ALREADY
4 DISCUSSED, IS THAT 139 RELATES TO THE PROCEDURE
5 FOR PROVING DEBTS IN AN INSOLVENT LIQUIDATION.

6 Q. OKAY. WHAT ABOUT SECTION 142,
7 WOULD YOU SAY THAT IS A LAW RELATING TO
8 INSOLVENCY?

9 A. SECTION 142 IS JUST PRESERVING THE
10 POSITION FOR SECURED CREDITORS TO ENFORCE THEIR
11 SECURITY AND ----

12 Q. IN A LIQUIDATION?

13 A. IN A LIQUIDATION. THAT WOULD HAVE
14 TO APPLY FOR BOTH INSOLVENT AND SOLVENT
15 LIQUIDATIONS BECAUSE THE STATUTORY STAY APPLIES
16 WHETHER THE LIQUIDATION IS SOLVENT OR INSOLVENT.

17 Q. YES. SO DO YOU THINK IT IS A LAW
18 RELATING TO INSOLVENCY, OR NOT?

19 A. WELL, I MEAN, ARGUABLY AS WITH MY
20 ANSWER TO SECTION 138, IT WOULD DEPEND ON WHETHER
21 THE LIQUIDATION IS SOLVENT OR INSOLVENT.

22 Q. IF YOU CHANGE THE DETERMINATION OF
23 THE LIQUIDATION FROM INSOLVENT TO SOLVENT, THEN
24 YOU ALSO CHANGE THE DETERMINATION OF THAT
25 PARTICULAR SECTION OF THE ACT AS WELL, DO YOU?

1 A. POSSIBLY. I MEAN, I REALLY THINK
2 THIS IS BEYOND THE SCOPE -- YOU KNOW, WE HAVE
3 DISCUSSED WHETHER THIS IS SOMETHING THAT I CAN
4 OPINE ON. YOU ARE PUSHING ME TO OPINE ON IT, SO
5 I AM TRYING.

6 Q. YES, I APPRECIATE THAT.

7 A. I KNOW IT IS VERY CONTRITE.

8 Q. JUST ONE MORE.

9 A. OKAY.

10 Q. SECTION 97.

11 A. OKAY.

12 Q. THAT IS THE STAYING PROVISION.

13 A. YES.

14 Q. IS THAT A LAW RELATING TO
15 INSOLVENCY?

16 A. YOU KNOW, AGAIN, AS WE HAVE
17 DISCUSSED, SECTION 97 APPLIES TO BOTH SOLVENT AND
18 INSOLVENT LIQUIDATIONS. I THINK MY ANSWER IN
19 RELATION TO THAT SECTION WOULD BE THE SAME AS MY
20 ANSWER IN RELATION TO 138 AND THE OTHER SECTIONS
21 THAT WE HAVE LOOKED AT THAT APPLY TO BOTH.

22 Q. OKAY. HOWEVER PAINFUL IT IS,
23 I WANT TO TAKE YOU THROUGH A FEW MORE HYPOTHESES.

24 A. OKAY.

25 Q. THIS TIME THE DEBTOR IS IN

1 VOLUNTARY LIQUIDATION.

2 A. OKAY.

3 Q. THE CREDITOR APPLIES TO COURT FOR A
4 SUPERVISION ORDER ON THE BASIS THAT THE COMPANY IS
5 UNABLE TO PAY ITS DEBTS.

6 A. OKAY.

7 MR. MORRIS: I APOLOGISE, DID YOU
8 SAY ----

9 MISS LEAHY: VOLUNTARY LIQUIDATION.

10 MR. MORRIS: VOLUNTARY LIQUIDATION.

11 A. SO THE CREDITOR IS APPLYING FOR A
12 SUPERVISION ORDER?

13 BY MISS LEAHY:

14 Q. UNDER SECTION 131.

15 A. OKAY.

16 Q. THE COURT MAKES A SUPERVISION
17 ORDER. IS THE OFFICIAL LIQUIDATION A SOLVENT OR
18 AN INSOLVENT LIQUIDATION?

19 A. WELL, THAT IS FOR THE LIQUIDATOR TO
20 DETERMINE.

21 Q. RIGHT. AND WAS THE WINDING UP
22 ORDER MADE UNDER A LAW RELATING TO INSOLVENCY?

23 A. IF THE SUPERVISION APPLICATION WAS
24 MADE UNDER SECTION 131A, THEN I WOULD SAY YES.

25 Q. BUT WOULD YOU SAY NO IF IT WAS MADE

1 UNDER SECTION 131B?

2 A. YES, I WOULD.

3 Q. SO ON YOUR UNDERSTANDING OF LAW
4 RELATING TO INSOLVENCY, YOU COULD EVEN DIVIDE UP
5 SECTIONS. SOME PARTS OF SECTIONS CAN BE A LAW
6 RELATING TO INSOLVENCY AND OTHER PARTS OF THE
7 SECTION CANNOT BE A LAW RELATING TO INSOLVENCY?

8 A. COULD BE.

9 Q. IS THAT YOUR OPINION?

10 A. TO THE EXTENT THAT I HAVE AN
11 OPINION, YES.

12 Q. SAME FACTS, VOLUNTARY LIQUIDATION
13 AGAIN. THIS TIME THE OFFICIAL LIQUIDATOR MAKES AN
14 ORDER 8 DETERMINATION THAT THE COMPANY IS SOLVENT.
15 WAS THE SUPERVISION ORDER MADE UNDER A LAW
16 RELATING TO INSOLVENCY?

17 A. THE SUPERVISION ORDER WILL STILL BE
18 MADE UNDER SECTION 131A.

19 Q. MMM-HMM.

20 A. SO I WOULD SAY THE SUPERVISION
21 ORDER WAS MADE UNDER A LAW RELATING TO INSOLVENCY
22 BUT THE PROCEEDING IS NOT NOW PROCEEDING UNDER A
23 LAW RELATING TO INSOLVENCY.

24 Q. OKAY. GOING BACK TO A COURT
25 COMPULSORY ORDER ----

1 A. OKAY.

2 Q. ---- A COURT MAKES A WINDING UP
3 ORDER ON THE PETITION OF A CREDITOR WHO SAYS THAT
4 THE COMPANY IS UNABLE TO PAY ITS DEBTS AS THEY
5 FALL DUE.

6 A. YES.

7 Q. THE OFFICIAL LIQUIDATOR MAKES AN
8 ORDER 8 DECLARATION THAT THE COMPANY IS INSOLVENT
9 AND ONE MONTH LATER HE CHANGES HIS MIND AND MAKES
10 A NEW ORDER 8 DECLARATION THAT THE COMPANY IS IN
11 FACT INSOLVENT.

12 A. OKAY.

13 Q. SO CREDITOR'S PETITION, COMPANY
14 UNABLE TO PAY ITS DEBTS, WINDING UP ORDER MADE BY
15 THE COURT, DETERMINATION OF INSOLVENCY FOLLOWED BY
16 A DETERMINATION OF SOLVENCY.

17 A. MMM-HMM.

18 Q. IS THE OFFICIAL LIQUIDATION
19 COMPULSORY ORDER MADE UNDER A LAW RELATING TO
20 INSOLVENCY? I THINK YOUR ANSWER TO THAT IS YES,
21 AND IN YOUR PREVIOUS ANSWERS.

22 A. YES.

23 Q. DID THE STATUS OF THAT ORDER CHANGE
24 AT ANY TIME DURING THE VARIOUS DETERMINATIONS THAT
25 THE OFFICIAL LIQUIDATOR MADE?

1 A. SO NOT THE STATUS OF THE ORDER BUT
2 THE STATUS OF THE PROCEEDING.

3 Q. CAN YOU EXPLAIN TO ME HOW YOU
4 DIFFERENTIATE THE PROCEEDING FROM THE INITIATION
5 ORDER, BECAUSE WHEN ONE LOOKS AT AN INITIATION
6 ORDER IN THE CAYMAN ISLANDS IT SAYS IN OFFICIAL
7 LIQUIDATION, RIGHT?

8 A. YES.

9 Q. YOU DO NOT SEE ANY ORDERS OR ANY
10 TITLES WHICH SAY IN SOLVENT OFFICIAL LIQUIDATION
11 OR INSOLVENT OFFICIAL LIQUIDATION?

12 A. NO, THAT IS CORRECT.

13 Q. AND THE NUMBER, THAT IS THE FSD
14 NUMBER, THAT IS APPLIED TO THE ORDER, THE ORIGINAL
15 ORDER, IS THE PROCEEDING NUMBER, RIGHT?

16 A. YES.

17 Q. AND THAT NEVER CHANGES THROUGHOUT
18 THE LIFE OF THE INSOLVENCY?

19 A. NO.

20 Q. SO THE PROCEEDING IS THE OFFICIAL
21 LIQUIDATION INITIATED BY THAT ORIGINAL WINDING UP
22 ORDER UNDER FSD NUMBER 51 OF 2017, LET US SAY?

23 A. YES.

24 Q. SO THAT IS WHY I AM STRUGGLING TO
25 UNDERSTAND THIS DISTINCTION THAT YOU ARE TRYING TO

1 DRAW BETWEEN WHETHER THE ORDER ITSELF WAS MADE
2 UNDER A LAW RELATING TO INSOLVENCY AND WHETHER THE
3 PROCEEDING, THE OFFICIAL LIQUIDATION, IS
4 PROCEEDING UNDER A LAW RELATING TO INSOLVENCY?

5 A. I MEAN, I AM NOT REALLY TRYING TO
6 DRAW ANY DISTINCTIONS. YOU KNOW, IT IS REALLY NOT
7 SOMETHING ON WHICH I FEEL QUALIFIED TO OPINE, BUT
8 YOU ARE PUSHING ME TO AND I AM TRYING TO ANSWER
9 THE QUESTIONS AS BEST I CAN.

10 Q. OKAY. I JUST WANT TO LOOK VERY
11 BRIEFLY AT FACTS THAT ARE MORE RELEVANT TO THIS
12 PARTICULAR CASE.

13 A. OKAY.

14 Q. BECAUSE I THINK YOU KNOW HERE THAT
15 WHAT ACTUALLY OCCURRED WAS THAT THERE WAS A
16 VOLUNTARY LIQUIDATION.

17 A. YES.

18 Q. AND THAT THE DIRECTORS DID NOT SIGN
19 THE DECLARATIONS OF SOLVENCY.

20 A. YES.

21 Q. AND THEREFORE THE LIQUIDATOR WAS
22 OBLIGATED TO APPLY TO COURT UNDER SECTION 124 FOR
23 A SUPERVISION ORDER?

24 A. YES.

25 Q. NOW, THE REASON THAT A LIQUIDATOR

1 IS REQUIRED TO APPLY TO COURT FOR A SUPERVISION
2 ORDER WHERE A DECLARATION FOR SOLVENCY HAS NOT
3 BEEN SIGNED BY ALL THE DIRECTORS IS BECAUSE IN
4 THAT SITUATION THE COMPANY IS DEEMED INSOLVENT,
5 RIGHT?

6 A. WELL, I KNOW THERE HAVE BEEN A
7 COUPLE OF FIRST INSTANCE CASES IN CAYMAN WHERE THE
8 JUDGES HAVE SUGGESTED THAT THAT IS THE REASON THAT
9 SECTION 134 SAYS WHAT IT SAYS. I AM NOT CONVINCED
10 THAT THEY ARE RIGHT, BUT I ACCEPT THAT THOSE
11 DECISIONS ARE OUT THERE, AND THAT IS WHAT THEY
12 SAY.

13 Q. THAT IS VERY FAIR OF YOU. IF WE
14 JUST STAND BACK AND WE LOOK AT A VOLUNTARY
15 LIQUIDATION AND SEE ONE OF ITS KEY DISTINGUISHING
16 FEATURES, WHICH IS THAT IT MUST ALWAYS BE A
17 SOLVENT LIQUIDATION, CORRECT?

18 A. YES.

19 Q. SO IF IT MUST ALWAYS BE A SOLVENT
20 LIQUIDATION, THEN THERE NEEDS TO BE SOME EARLY
21 MECHANISM TO ESTABLISH WHETHER THERE IS AT LEAST A
22 RISK OF INSOLVENCY?

23 A. YES.

24 Q. TO PUT IT ANOTHER WAY, WHAT IS THE
25 LIQUIDATOR SUPPOSED TO DO? HE HAS JUST GOT HIS

1 FEET UNDER THE TABLE. THERE ARE DIFFERENT THINGS
2 HE COULD DO, BUT WHAT THE LEGISLATION PRESCRIBES
3 IS THAT HE ASKS FOR DECLARATIONS OF SOLVENCY ----

4 A. YES.

5 Q. ---- AND THEN PRESCRIBES THAT IF
6 THEY ARE NOT SIGNED THE LIQUIDATOR HAS NO CHOICE
7 AT ALL, HE HAS TO MAKE AN APPLICATION TO COURT,
8 CORRECT?

9 A. YES.

10 Q. WHEN HE GOES TO COURT, SOMETIMES HE
11 HAS TO GIVE NOTICE TO THE CREDITORS AND THE
12 CONTRIBUTORIES, CORRECT?

13 A. YES.

14 Q. THEY CAN APPEAR, BUT THEY CAN ONLY
15 MAKE REPRESENTATIONS AS TO WHO IS GOING TO BE
16 APPOINTED OFFICIAL LIQUIDATOR, CORRECT?

17 A. YES.

18 Q. THEY CANNOT STOP THE COMPANY BEING
19 FLIPPED OR CONVERTED INTO OFFICIAL LIQUIDATION?

20 A. CORRECT.

21 Q. BECAUSE THE SAME SORT OF DEEMING
22 PROCESS IS UNDERTAKEN AS IS UNDERTAKEN WHERE A
23 CREDITOR PRESENTS A PETITION ON THE BASIS THAT ITS
24 INVOICE HAS NOT BEEN PAID?

25 A. WELL, YOU SEE, THIS IS WHERE I AM

1 NOT SURE THAT THOSE FIRST INSTANCE DECISIONS ARE
2 RIGHT, BECAUSE YOU HAVE OFFICIAL LIQUIDATION ON A
3 CREDITOR'S PETITION BUT A LOT OF CAYMAN OFFICIAL
4 LIQUIDATIONS ARE ACTUALLY STARTED BY A
5 SHAREHOLDER'S PETITION, AND YOU HAVE THE JUST AND
6 EQUITABLE WINDING UP ----

7 Q. YES.

8 A. ---- JURISDICTION. IN ORDER TO
9 SUCCEED ON A J AND E PETITION, THE SHAREHOLDER HAS
10 TO SHOW THAT THERE IS GOING TO BE A SURPLUS
11 AVAILABLE FOR DISTRIBUTION. SO IT HAS TO SHOW
12 THAT IT HAS A TANGIBLE INTEREST ----

13 Q. INTEREST, YES.

14 A. ---- IN THE PROCEEDINGS. SO THOSE
15 COMPANIES THAT ARE GOING INTO OFFICIAL LIQUIDATION
16 ARE BY DEFINITION SOLVENT.

17 Q. MMM-HMM.

18 A. I DO NOT REALLY HAVE A VIEW ON IT
19 ONE WAY OR THE OTHER, BUT I AM NOT SURE THAT THOSE
20 OBITER DICTA OF JONES AND QUINN, THOSE DECISIONS,
21 WHERE THEY SAY THAT THE REASON THAT IT IS GOING
22 INTO LIQUIDATION IS BECAUSE THERE IS A REBUTTABLE
23 PRESUMPTION OF INSOLVENCY. I AM JUST NOT
24 CONVINCING THAT THAT IS THE CASE BECAUSE ----

25 Q. THIS IS SOLELY BECAUSE ----

1 MR. MORRIS: LET HER FINISH,
2 PLEASE.

3 MISS LEAHY: I THOUGHT SHE HAD.

4 MR. MORRIS: SHE HAD NOT.

5 A. I JUST SEE THE SITUATION OF A
6 COMPANY IN VL THAT IS COMING UNDER COURT
7 SUPERVISION BECAUSE THE DIRECTORS HAVE NOT SIGNED
8 THE DECLARATION OF SOLVENCY. I DO NOT SEE WHY
9 THAT IS MORE AKIN TO A COMPANY THAT IS GOING INTO
10 LIQUIDATION ON A CREDITOR'S PETITION THAN IT IS TO
11 A COMPANY THAT IS GOING INTO COMPULSORY
12 LIQUIDATION ON A SHAREHOLDER'S PETITION.

13 BY MISS LEAHY:

14 Q. LET ME SUGGEST SOME REASONS TO YOU
15 IF I MAY.

16 A. OKAY.

17 Q. FIRST OF ALL, ON A J AND E PETITION
18 THE COMPANY IS -- THE BUSINESS, IF IT IS A TRADING
19 BUSINESS, CAN CONTINUE TO TRADE AND PAY ITS
20 CREDITORS IN THE ORDINARY WAY, CAN IT NOT?

21 A. YOU MEAN AFTER ITS ----

22 Q. AFTER IT HAS PRESENTED THE
23 PETITION. AFTER THE PETITION HAS BEEN PRESENTED.

24 A. SO YOU STILL HAVE TO APPLY FOR A
25 VALIDATION ORDER UNDER SECTION 99, IF THAT IS WHAT

1 YOU ARE GETTING AT.

2 Q. SURE. IT IS A RUBBER-STAMPING
3 EXERCISE IN THE CASE OF A SOLVENT COMPANY ----

4 A. NOT NECESSARILY, NO.

5 Q. ---- THAT IS APPLYING FOR J AND E?

6 A. NO, IT IS NOT A RUBBER-STAMPING
7 EXERCISE.

8 Q. OKAY. BUT YOU HAVE ----

9 A. IF YOU LOOK AT THE ----

10 MR. MORRIS: ONE OF YOU NEEDS TO
11 LET THE OTHER FINISH, I WILL PUT IT THAT WAY.

12 (LAUGHTER)

13 BY MISS LEAHY:

14 Q. WE DO NOT NEED TO HAVE A DEBATE
15 ABOUT THIS.

16 A. NO.

17 Q. LET US ACCEPT IT IS NOT.

18 A. OKAY.

19 Q. YOU GO AND GET YOUR VALIDATION
20 ORDER, OKAY?

21 A. YES.

22 Q. IT IS A J AND E PETITION, SO THERE
23 IS GOING TO BE A BIG DEBATE AS TO WHETHER SOMEBODY
24 BEHAVED BADLY OR NOT DURING THE COURSE OF THE
25 RELATIONSHIP.

1 A. YES, HMM-MMM.

2 Q. AND THAT IS GOING TO TAKE SOME TIME
3 TO COME ON AND BE FINALLY DETERMINED, CORRECT?

4 A. YES.

5 Q. IT IS NOT LIKE A CREDITORS'
6 PETITION FOR A WINDING UP ORDER, IS IT? IT CAN
7 TAKE MANY MONTHS, SOMETIMES YEARS FOR THE PETITION
8 TO BE FINALLY DETERMINED IN THE CASE OF A J AND E?

9 A. YES.

10 Q. AND AT THE END OF IT, EVEN IF THE
11 PETITION IS SUCCESSFUL, THEY MIGHT NOT NECESSARILY
12 EITHER HAVE PETITIONED FOR OR WANT AN ACTUAL
13 WINDING UP ORDER, RIGHT?

14 A. SO AT THE END OF A J AND E ----

15 Q. YES.

16 A. YES, THERE ARE ALTERNATIVE
17 REMEDIES.

18 Q. YES. WHEREAS WHEN WE ARE DEALING
19 WITH A VOLUNTARY LIQUIDATION, AS WE HAVE
20 DISCUSSED, AT THE VERY OUTSET IT IS A TERMINAL
21 PROCESS WHERE THE INTENTION OF THE OFFICIAL
22 LIQUIDATOR IS TO GET IN THE ASSETS, DISTRIBUTE
23 THEM AND THEN DISSOLVE THE COMPANY, CORRECT?

24 A. YES.

25 Q. SO THERE IS IN FACT SIGNIFICANT

1 DIFFERENCES BETWEEN THE TWO FORMS OF PROCESSES?

2 A. I MEAN, THERE ARE DIFFERENCES.

3 I AM NOT SAYING THAT THEY ARE THE SAME. I AM NOT
4 SURE IT IS VERY RELEVANT, BUT I AM NOT SURE THAT A
5 VL COMING UNDER COURT SUPERVISION IS NECESSARILY,
6 YOU KNOW, MORE AKIN TO THE CREDITORS' WINDING UP
7 ROUTE THAN THE SHAREHOLDERS' WINDING UP ROUTE.

8 ALL THE OTHER ROUTES, WE ALSO HAVE 92C WHERE THE
9 PERIOD FIXED FOR THE DURATION OF THE COMPANY
10 EXPIRES. IT JUST SEEMS TO ME THAT IN THOSE TWO
11 CASES, AND IT IS ONLY MENTIONED VERY BRIEFLY AND
12 OBITER, IT IS NOT PART OF THE REASONING FOR THE
13 DECISIONS AT ALL, THE JUDGES SEEM TO ME TO BE
14 PROCEEDING ON THE BASIS THAT THE ONLY REASON FOR
15 GOING INTO OFFICIAL LIQUIDATION IS INSOLVENCY, AND
16 THAT IS OBVIOUSLY NOT THE CASE. I DO NOT THINK
17 ANYTHING TURNS ON IT, AND I HAVE NOT GIVEN IT A
18 HUGE AMOUNT OF CONSIDERATION.

19 Q. OKAY. JUST TO WRAP THIS UP, I WILL
20 SUGGEST TO YOU THAT THE ONLY REASON THAT A COMPANY
21 HAS TO CONVERT FROM VOLUNTARY LIQUIDATION, HAS TO,
22 IS REQUIRED TO, IS BECAUSE IT IS INSOLVENT. THERE
23 ARE ----

24 A. I DO NOT AGREE WITH THAT.

25 Q. COULD I ASK YOU TO TURN TO

1 PARAGRAPH 71 OF YOUR DECLARATION IN THESE
2 PROCEEDINGS, PLEASE, AND CAN YOU JUST REMIND
3 YOURSELF OF THAT? (PAUSE FOR READING)

4 A. YES.

5 Q. IN THIS PARAGRAPH YOU ARE CRITICAL
6 OF MR. COWAN'S DECLARATION?

7 A. YES.

8 Q. WHY DO YOU THINK IT WAS RELEVANT --
9 SORRY, I WILL PUT IT ANOTHER WAY. WHY DO YOU
10 THINK THAT MR. COWAN SHOULD HAVE TOLD THE COURT
11 THAT IN A SOLVENT LIQUIDATION THERE IS NOT A
12 DIVIDEND BUT IN FACT THE CREDITORS GET PAID IN
13 FULL?

14 A. CAN WE SEE MR. COWAN'S DECLARATION?

15 Q. OF COURSE. WE DID NOT HAND THAT
16 UP. IT IS IN MY DIVIDER 2.

17 (EXHIBIT 8 MARKED FOR IDENTIFICATION)

18 BY MISS LEAHY:

19 Q. PARAGRAPH 25 ON PAGE 7.

20 A. YES.

21 Q. THAT IS A PARAGRAPH YOU ARE
22 CRITICISING?

23 A. YES.

24 Q. NOW, YOU ACCEPT THAT WHAT IS STATED
25 IN PARAGRAPH 25 IS A CORRECT STATEMENT OF CAYMAN

1 LAW?

2 A. YES.

3 Q. WHY DO YOU CONSIDER THAT MR. COWAN
4 SHOULD HAVE GONE FURTHER AND EXPLAINED THAT IN A
5 SOLVENT LIQUIDATION THE CREDITORS ARE NOT PAID
6 RATABLY BUT THEY ARE PAID, AS YOU SAY, IN THE
7 ORDINARY COURSE RATHER THAN PURSUANT TO A
8 COLLECTIVE PROCESS.

9 A. PURSUANT TO?

10 Q. A COLLECTIVE PROCESS, YOU SAY. WHY
11 DO YOU THINK HE NEEDED TO TELL THE COURT THAT?

12 MR. MORRIS: OBJECTION.

13 A. I THINK THAT PARAGRAPH 25 OF
14 MR. COWAN'S DECLARATION GIVES THE IMPRESSION THAT
15 THE CREDITORS IN THIS PROCEEDING ARE GOING TO BE
16 PAID ON PARI PASSU BASIS.

17 BY MISS LEAHY:

18 Q. WHY DOES THAT MATTER?

19 A. WELL, IT IS MISLEADING. IT
20 SUGGESTS TO THE COURT THAT SOMETHING IS GOING TO
21 HAPPEN THAT IS NOT ACTUALLY THE CASE.

22 Q. BUT WOULD NOT ALL CREDITORS BE
23 DELIGHTED TO BE PAID IN FULL RATHER THAN RECEIVE A
24 RATEABLE DIVIDEND?

25 A. YES.

1 Q. AND IS NOT ANY FOREIGN COURT
2 LOOKING AT THE PROCESS IT IS GOING TO RECOGNISE BE
3 CONCERNED TO ENSURE THAT CREDITORS ARE TREATED
4 EQUALLY? THAT IS ALL IT WANTS, RIGHT, TO ENSURE
5 THAT CREDITORS ARE TREATED EQUALLY?

6 MR. MORRIS: OBJECTION TO THE FORM
7 OF THE QUESTION.

8 A. I MEAN, I DO NOT THINK IT IS REALLY
9 FOR ME TO SAY WHAT THE NEW YORK COURT WANTS.
10 BY MISS LEAHY:

11 Q. DO YOU THINK A CAYMAN COURT WOULD
12 BE INTERESTED TO KNOW WHETHER ANY LIQUIDATOR
13 SEEKING COMMON LAW RECOGNITION IN THE CAYMAN
14 ISLANDS THAT THE DOMESTIC INSOLVENCY THAT APPLIED
15 TREATED CREDITORS EQUALLY?

16 A. YES. I MEAN, OUR TEST IS
17 DIFFERENT, AS YOU KNOW, BUT YES.

18 Q. YES, YES. THANK YOU. WHAT DOES
19 PARI PASSU MEAN?

20 A. PARI PASSU MEANS ON AN EQUAL STEP.

21 Q. YES.

22 A. EQUALLY, AT THE SAME TIME, RATABLY.

23 Q. OKAY. NOT NECESSARILY RATABLY.
24 I MEAN, IT COULD BE RATABLY OF 100 PENCE IN THE
25 POUND?

1 A. YES.

2 Q. DO YOU JUST WANT TO LOOK AGAIN AT
3 MR. COWAN'S PARAGRAPH 25, AND TELL ME WHETHER YOU
4 STILL THINK IT IS MISLEADING?

5 A. WELL, I DO. I KNOW WHAT YOU ARE
6 TRYING TO GET AT.

7 Q. WHAT AM I TRYING TO GET AT?

8 A. YOU ARE TRYING TO SUGGEST THAT THE
9 CREDITORS ARE BEING PAID PARI PASSU BECAUSE THEY
10 ARE ALL BEING PAID IN THE ORDINARY COURSE OF
11 BUSINESS.

12 Q. WELL, EVEN IF YOU DO NOT AGREE WITH
13 THAT, I THINK THERE IS SOME COMMON GROUND BETWEEN
14 US, WHICH IS THAT CREDITORS PREFER TO BE PAID 100
15 PENCE IN THE POUND ----

16 A. YES.

17 Q. ---- THAN ----

18 MR. MORRIS: I WILL STIPULATE TO
19 THAT. (LAUGHTER) HOW ABOUT THAT?
20 BY MISS LEAHY:

21 Q. SO WE HAVE THAT IN THE BANK, OKAY?

22 A. YES, OKAY.

23 Q. SO ON THAT BASIS, HOW IS MR. COWAN
24 POTENTIALLY MISLEADING THE US COURT?

25 A. WELL, BECAUSE SAYING THAT -- AS AN

1 INSOLVENCY LAWYER IN ANY JURISDICTION, I THINK WE
2 ALL UNDERSTAND WHAT CREDITORS BEING PAID PARI
3 PASSU MEANS. IT MEANS EVERYBODY BEING PAID THE
4 SAME SENSE ON THE DOLLAR AT THE SAME TIME AS PART
5 OF A COLLECTIVE PROCESS FOR THE ASSESSMENT OF
6 CLAIMS AND THEN THE PAYMENT OF THOSE CLAIMS. THAT
7 IS NOT WHAT HAPPENS IN THE COURSE OF A SOLVENT
8 LIQUIDATION.

9 Q. WE AGREED THAT IT MIGHT HAPPEN IN
10 THE COURSE OF A SOLVENT LIQUIDATION, DID WE NOT?

11 A. WELL, NO, THE WHOLE THING IS NOT
12 GOING TO HAPPEN IN THE COURSE OF A SOLVENT
13 LIQUIDATION, BECAUSE IT IS ONLY DISPUTED DEBTS
14 THAT ARE POTENTIALLY SUBJECT TO THE PROOF OF DEBT
15 PROCESS.

16 Q. NO, BUT WE ALSO AGREED I THOUGHT
17 THAT A LIQUIDATOR WHO DID NOT HAVE THE CASH TO PAY
18 THE CREDITORS UNTIL HE HAD MADE REALISATIONS WOULD
19 NOT BE ABLE TO PAY IN THE ORDINARY COURSE?

20 A. OKAY.

21 Q. YOU DO NOT AGREE WITH THAT? WHAT
22 DO YOU SAY THE LIQUIDATOR SHOULD DO IN THAT
23 SITUATION?

24 MR. MORRIS: OBJECTION. ASKED AND
25 ANSWERED.

1 A. I THINK WE HAVE ALREADY COVERED
2 THAT.

3 BY MISS LEAHY:

4 Q. I AM NOT SURE. I THOUGHT WE AGREED
5 IT, BUT NOW YOU SEEM TO BE DISAGREEING. THAT IS
6 WHY I AM NOT SURE.

7 A. SO WHAT IS THE QUESTION?

8 Q. THERE ARE A COUPLE OF SCENARIOS
9 -----

10 A. YES.

11 Q. ----- WHERE IN A SOLVENT
12 LIQUIDATION, AT LEAST A COUPLE OF SCENARIOS IN A
13 SOLVENT LIQUIDATION, WHERE A LIQUIDATOR MAY NOT BE
14 ABLE TO PAY EACH CREDITOR AS THE DEBT FALLS DUE IN
15 FULL.

16 A. YES.

17 Q. ONE OF THE SITUATIONS THAT WE
18 DISCUSSED I THOUGHT AND AGREED, BUT THAT IS JUST
19 CHECKING, ONE OF THE DISCUSSIONS WE DISCUSSED WAS
20 WHERE THE COMPANY IS -- THERE IS A MASSIVE BALANCE
21 SHEET SURPLUS BUT THE LIQUIDATOR HAS TO GO AND
22 REALISE THE SOME ASSETS BEFORE HE CAN START PAYING
23 THE CREDITORS?

24 A. YES.

25 Q. YOU AGREE WITH THAT?

1 A. YES.

2 Q. THAT IS ONE SITUATION. ANOTHER
3 SITUATION IS WHERE ALTHOUGH THE COMPANY SEEMS TO
4 BE SOLVENT AT THE OUTSET, SUBSEQUENTLY THE
5 LIQUIDATOR REALISES THAT IT IS INSOLVENT, YES?

6 A. YES.

7 Q. SO IN THOSE SITUATIONS THE
8 TREATMENT OF CREDITORS IS GOING TO BE VERY SIMILAR
9 TO THE TREATMENT OF CREDITORS IN AN INSOLVENT
10 LIQUIDATION, IS IT NOT?

11 A. WELL, IN THE SECOND SITUATION WHERE
12 THE COMPANY SUBSEQUENTLY BECOMES INSOLVENT, IT IS
13 BECAUSE THE LIQUIDATOR IS GOING TO HAVE TO REVISIT
14 HIS OR HER SOLVENCY CERTIFICATION AND GET PROOF OF
15 DEBT AND EVERYONE IS GOING TO GET LESS THAN 100
16 CENTS ON THE DOLLAR. IN YOUR FIRST SITUATION,
17 I MEAN, I DO NOT THINK -- SO EVERYONE IS GOING TO
18 HAVE TO WAIT IN THE SAME WAY THAT THEY WOULD IN AN
19 INSOLVENT LIQUIDATION, BUT I WOULD NOT SEE THE
20 LIQUIDATOR IN THAT SITUATION SENDING OUT PROOFS OF
21 DEBT, FOR EXAMPLE. I THINK HE OR SHE WOULD
22 PROBABLY, IF THE DEBTS ARE NOT DISPUTED, RELY ON
23 THE INVOICES OR WHATEVER HE OR SHE HAD RECEIVED
24 FROM THE CREDITORS IN THE ORDINARY COURSE.

25 Q. OKAY, RIGHT.

1 A. I MEAN, THEY ARE ALL GOING TO GET
2 PAID AT THE SAME TIME WHEN THE LIQUIDATOR COMES
3 INTO FUNDS. I AGREE WITH THAT, IF THAT IS YOUR
4 QUESTION.

5 Q. I AM SAYING THAT IN AN INSOLVENT
6 LIQUIDATION THAT CREDITORS WILL GET PAID AT THE
7 SAME TIME WHEN THERE ARE SUFFICIENT FUNDS TO MAKE
8 A DIVIDEND?

9 A. THAT IS TRUE.

10 Q. I AM STILL TRYING TO UNDERSTAND
11 PARAGRAPH 25 AND YOUR COMPLAINT IN RELATION TO IT.
12 COULD WE JUST GO BACK TO WHAT WE DISCUSSED BEFORE
13 ABOUT IN A CAYMAN COURT WHERE THERE WAS AN
14 APPLICATION FOR COMMON LAW RECOGNITION?

15 A. YES.

16 Q. I THINK YOU AGREED THAT THE JUDGE
17 WOULD BE CONCERNED TO KNOW WHETHER THE DOMESTIC
18 INSOLVENCY LAW TREATED CREDITORS EQUALLY.

19 A. YES.

20 Q. SO THE FOREIGN INSOLVENCY LAW, THE
21 DOMESTIC ONE, IS THE SAME AS CAYMAN LAW IT
22 TRANSPiRES?

23 A. OKAY.

24 Q. AND THE COMPANY IS IN FACT IN A
25 SOLVENT LIQUIDATION?

1 A. OKAY.

2 Q. THE LIQUIDATOR APPLIES FOR COMMON
3 LAW RECOGNITION AND IN THE EVIDENCE IN SUPPORT OF
4 THAT APPLICATION THERE IS A STATEMENT, THE SAME AS
5 IN PARAGRAPH 25, THAT A GENERAL PRINCIPLE
6 UNDERLYING, SAY THE LAW OF ZOGLAND, THE INSOLVENCY
7 REGIME IS THAT CREDITORS ARE TREATED ON A PARI
8 PASSU BASIS SUBJECT TO CERTAIN EXCEPTIONS?

9 A. MMM-HMM.

10 Q. WOULD YOU SAY THAT WAS MISLEADING?

11 MR. MORRIS: OBJECTION TO THE FORM
12 OF THE QUESTION.

13 A. IF WE ARE TALKING ABOUT CAYMAN
14 COURT RECOGNISING FOREIGN LIQUIDATORS, CAN WE HAVE
15 A LOOK AT SECTION 240?

16 BY MISS LEAHY:

17 Q. SURE.

18 A. I MEAN, IT IS A DIFFERENT TEST FROM
19 THE TEST THAT THE US COURT IS LOOKING AT.

20 Q. THAT IS WHY I HAVE WALKED AWAY FROM
21 THAT, BECAUSE YOU SAID YOU FELT UNCOMFORTABLE IN
22 THAT AREA.

23 A. YES.

24 Q. I AM JUST ASKING YOU AS A CAYMAN
25 LAWYER.

1 A. YES. I MEAN, IF YOU LOOK AT
2 SECTION 241, WHAT THE CAYMAN COURT NEEDS IS A
3 FOREIGN BANKRUPTCY PROCEEDING, AND THE COMPANY IN
4 QUESTION IS REFERRED TO THROUGHOUT THAT SECTION AS
5 THE DEBTOR. YOU KNOW, IF IT WAS A COMPANY IN A
6 SOLVENT LIQUIDATION PROCESS LIKE THIS ONE, YOU
7 WOULD HAVE A QUESTION, AND IT IS A QUESTION TO
8 WHICH I DO NOT KNOW THE ANSWER OFF THE TOP OF MY
9 HEAD, AS TO WHETHER THAT CONSTITUTES A FOREIGN
10 BANKRUPTCY PROCEEDING AND WHETHER THAT COMPANY
11 QUALIFIES AS A DEBTOR FOR THE PURPOSE OF SECTION
12 241.

13 Q. OKAY. I AM NOT GOING TO DEBATE
14 THAT WITH YOU. I WAS REALLY ASKING ABOUT THIS
15 POINT, WHICH IS THIS, WHATEVER THAT SECTION MEANS,
16 THAT THE CAYMAN COURT AS A MINIMUM WOULD HAVE TO
17 BE SATISFIED THAT CREDITORS ARE GOING TO BE
18 TREATED EQUALLY BEFORE IT WOULD EVER RECOGNISE ANY
19 FORM OF FOREIGN PROCEEDING. DO YOU AGREE WITH
20 THAT?

21 A. YES.

22 Q. OR pari passu, if you like?

23 A. YES.

24 Q. I AM REALLY JUST TRYING TO
25 UNDERSTAND WHY YOU SAY IN THAT SORT OF CONTEXT

1 PARAGRAPH 25 ON ITS OWN IS MISLEADING.

2 MR. MORRIS: OBJECTION. ASKED AND
3 ANSWERED.

4 A. I THINK IT IS MISLEADING BECAUSE IT
5 IMPLIES THAT CREDITORS ARE GOING TO BE PAID AS
6 PART OF A COLLECTIVE PROCESS FOR THE ADJUDICATION
7 OF DEBTS AND DISTRIBUTION OF DIVIDENDS AS THEY
8 WOULD IN AN INSOLVENT LIQUIDATION.

9 BY MISS LEAHY:

10 Q. BUT YOU ACCEPTED THAT IT WAS A
11 COLLECTIVE PROCESS EARLIER?

12 A. FOR THE BENEFIT OF THE
13 SHAREHOLDERS.

14 Q. IT IS STILL A COLLECTIVE PROCESS,
15 IS IT NOT, EVEN IF IT MIGHT BE FOR THE BENEFIT OF
16 SHAREHOLDERS?

17 A. YES.

18 Q. I AM GOING TO MOVE ON BECAUSE WE
19 ARE NOT GETTING ANYWHERE WITH THIS. I GUESS I
20 JUST WANT TO SUGGEST TO YOU THAT THERE IS NOTHING
21 AT ALL MISLEADING ABOUT THAT STATEMENT,
22 PARTICULARLY IN CIRCUMSTANCES WHERE MR. COWAN WAS
23 NOT SUGGESTING THAT CREDITORS ARE GOING TO DO
24 BETTER IN ASCENTRA THAN THEY WOULD IN A DIFFERENT
25 TYPE OF LIQUIDATION?

1 MR. MORRIS: I MOVE TO STRIKE.

2 THAT IS NOT A QUESTION. IT IS JUST A STATEMENT OF
3 COUNSEL.

4 A. I DO NOT AGREE.

5 BY MISS LEAHY:

6 Q. EARLIER YOU WERE SAYING THAT YOU
7 WERE NOT ASKED TO CONSIDER THE APPLICATION OF THE
8 DEFINITION OF SECTION 101(23) IN YOUR DECLARATION?

9 A. MMM-HMM.

10 Q. YOU HAVE NEVERTHELESS SUGGESTED
11 THAT BOTH MR. ROBINSON AND MR. COWAN SHOULD HAVE
12 SAID CERTAIN THINGS IN THEIR DECLARATION, RIGHT?

13 A. YES.

14 Q. AND YOU SAY THAT IT WAS MISLEADING
15 OF THEM NOT TO SAY THOSE THINGS?

16 A. YES.

17 Q. ARE YOU NOT BY SAYING THAT THEIR
18 EVIDENCE IS MISLEADING ESSENTIALLY IMPLICITLY
19 OPINING THAT A SOLVENT CAYMAN WINDING UP WITH ALL
20 ITS FEATURES IS NOT A COLLECTIVE JUDICIAL
21 PROCEEDING?

22 MR. MORRIS: OBJECTION TO THE FORM
23 OF THE QUESTION.

24 A. NO.

25 BY MISS LEAHY:

1 Q. WELL, THEN WHY ARE YOU SAYING THAT
2 HE OUGHT TO, OR THEY OUGHT TO HAVE BROUGHT CERTAIN
3 OF THESE FEATURES OF SOLVENT LIQUIDATIONS TO THE
4 ATTENTION OF THE COURT?

5 A. I AM SAYING THAT I THINK THEY ARE
6 IMPORTANT FEATURES AND THAT THEY ARE RELEVANT TO
7 WHAT THE COURT HAD TO DETERMINE.

8 Q. RELEVANCE AND IMPORTANCE, AS YOU
9 SAY, OBVIOUSLY TURNS ON THE CONTEXT?

10 A. YES.

11 Q. THE CONTEXT HERE IS THAT THE COURT
12 HAS TO DETERMINE WHETHER THE CAYMAN LIQUIDATION IS
13 A FOREIGN PROCEEDING?

14 A. YES.

15 Q. IF YOU HAVE NO OPINION AT ALL AS TO
16 WHETHER SOLVENT CAYMAN LIQUIDATION IS A FOREIGN
17 PROCEEDING, THEN YOU CANNOT LOOK AT MR. COWAN'S
18 AND MR. ROBINSON'S EVIDENCE AND SAY THAT THERE WAS
19 MATERIAL FACTS THAT THEY OUGHT TO HAVE BROUGHT TO
20 THE JUDGE IN NEW YORK'S ATTENTION, CAN YOU?

21 MR. MORRIS: OBJECTION TO THE FORM
22 OF THE QUESTION.

23 A. I THINK I CAN.

24 BY MISS LEAHY:

25 Q. SHOULD YOU NOT HAVE STOPPED YOUR

1 OPINION AT PARAGRAPH 68 AND NOT GONE ON TO
2 CRITIQUE MR. ROBINSON AND MR. COWAN?

3 MR. MORRIS: OBJECTION TO THE FORM
4 OF THE QUESTION.

5 A. NO.

6 BY MISS LEAHY:

7 Q. THERE IS NO PART OF YOUR STATEMENT
8 FROM PARAGRAPH 69 TO PARAGRAPH 76 THAT YOU
9 CONSIDER YOU SHOULD CHANGE OR ANY OF THE
10 ALLEGATIONS YOU MAKE THERE ABOUT THE CONTENT OF
11 MR. COWAN AND MR. ROBINSON'S EVIDENCE THAT YOU
12 SHOULD WITHDRAW?

13 A. NO.

14 Q. I JUST WANT TO ASK YOU AGAIN SOME
15 QUESTIONS ABOUT STANDING IN CAYMAN PROCEEDINGS,
16 BUT THEY ARE SLIGHTLY MOVING ON FROM PRECISELY THE
17 SAME AS WE DISCUSSED OVER AND OVER AGAIN THIS
18 MORNING.

19 A. OKAY.

20 Q. SLIGHTLY DIFFERENT TOPIC. I AM
21 MUCH MORE INTERESTED IN THIRD PARTIES WHO ARE NOT
22 CREDITORS AND CONTRIBUTORIES AND WHAT STANDING
23 THEY MIGHT HAVE, IN SOME WAY, TO PARTICIPATE IN
24 THE WINDING UP.

25 A. OKAY.

1 Q. SO WE HAVE A SITUATION -- FOR
2 EXAMPLE, I AM GOING TO START WITH A CREDITOR AND
3 THEN JUST BUILD IT UP.

4 A. OKAY.

5 Q. WE HAVE A SITUATION WHERE WE HAVE A
6 CREDITOR, AND IT IS AN INSOLVENT LIQUIDATION.

7 A. OKAY.

8 Q. WE BOTH AGREE THE CREDITOR HAS
9 STANDING TO COME ALONG TO COURT AND MAKE
10 REPRESENTATIONS ON THE LIQUIDATOR'S SANCTION
11 APPLICATION?

12 A. YES.

13 Q. WHAT THE LIQUIDATOR IS TRYING TO DO
14 IS GET SANCTION TO COMMENCE LITIGATION, RIGHT?

15 A. OKAY.

16 Q. WHEN ACTUALLY THE LIQUIDATOR WANTS
17 TO COMMENCE LITIGATION AGAINST THAT PARTICULAR
18 CREDITOR.

19 A. OKAY.

20 Q. WOULD YOU AGREE THAT ON THOSE FACTS
21 THE COURT WOULD NOT GIVE THE CREDITOR'S VIEWS ANY
22 WEIGHT BECAUSE THE CREDITOR'S INTEREST ARE ADVERSE
23 TO THE INSOLVENT ESTATE?

24 A. WELL, I MEAN, IT IS ALWAYS FACT
25 SPECIFIC.

1 Q. MMM.

2 A. SO YOU WOULD HAVE TO LOOK AT THE
3 FACTS OF THE PARTICULAR CASE AND THE NATURE OF THE
4 CLAIM AND WHATEVER. YOU KNOW, OFF THE TOP OF MY
5 HEAD AND WITHOUT DOING THAT ANALYSIS, I THINK IT
6 IS LIKELY THAT THE COURT WOULD EXCLUDE THAT
7 CREDITOR FROM BEING HEARD FROM THAT SANCTION
8 APPLICATION, BECAUSE ALSO IT WOULD TIP THE
9 CREDITOR OFF THAT THE LIQUIDATOR WAS ABOUT TO
10 BRING THE PROCEEDINGS AGAINST HIM OR HER.

11 Q. MMM. BUT THE LIQUIDATOR MAY HAVE
12 ALREADY SENT A LETTER BEFORE CLAIM, THE CREDITOR
13 MAY KNOW ABOUT IT, THE COURT WOULD HAVE, IF YOU
14 LIKE, THE POSSIBILITY, WHICH IS OFTEN USED IN
15 TRUST LITIGATION AND INSOLVENCY LITIGATION, TO
16 READ SOME OF THE EVIDENCE BEHIND CLOSED DOORS, SO
17 TO SPEAK, AND NOT SHARE IT WITH CREDITOR. YOU ARE
18 FAMILIAR WITH THAT SORT OF IN-BETWEEN PROCESS?

19 A. YES.

20 Q. YOU ARE VERY RIGHT TO SAY IT ALL
21 TURNS ON THE FACTS, BUT LET US JUST ASSUME HERE
22 THAT THE LIQUIDATOR HAS ADVICE FROM WILBERFORCE
23 CHAMBERS TO THE EFFECT THAT HE HAS A 65% CHANCE OF
24 SUCCESS, BECAUSE WE ARE NOT GOING TO SEE MUCH
25 HIGHER THAN THAT, ARE WE, AND WHAT THE CREDITOR IS

1 SAYING IS YOU SHOULD NOT ALLOW HIM TO BRING THIS
2 VEXATIOUS LITIGATION AGAINST ME BECAUSE IT IS
3 HOPELESS?

4 A. MMM-HMM.

5 Q. ON THOSE FACTS, THE COURT HAS TO
6 WEIGH EVERYTHING OBVIOUSLY, BUT THE CREDITOR DOES
7 NOT HAVE AN OPINION ON LEADING COUNSEL AT
8 WILBERFORCE CHAMBERS.

9 A. MMM.

10 Q. IT WOULD VERY RARE THAT THE COURT
11 WOULD GIVE MUCH WEIGHT TO THAT PARTICULAR
12 CREDITOR'S VIEW, WOULD IT NOT?

13 A. YES, I MEAN, IT IS FACT SPECIFIC,
14 BUT YES. GENERALLY, YES.

15 Q. I JUST WANT TO COME ON TO A
16 DIFFERENT SITUATION WHERE THE INDIVIDUAL IS NOT A
17 CREDITOR, OKAY, NOT A CONTRIBUTORY, AND THE
18 LIQUIDATOR IS TRYING TO SUE THIS PERSON, THIS
19 THIRD PARTY, AND THE LIQUIDATOR APPLIES FOR
20 SANCTION AND HE ADVERTISES HIS APPLICATION.

21 A. MMM-HMM.

22 Q. SO THE THIRD PARTY GETS WINDS OF
23 IT.

24 A. OKAY.

25 Q. DOES THE THIRD PARTY HAVE STANDING

1 TO APPEAR ON THE APPLICATION?

2 A. NO.

3 Q. NEXT AND FINAL SCENARIO.

4 A. OKAY.

5 Q. THE LIQUIDATOR STARTS CHAPTER 15
6 PROCEEDINGS IN THE US TO GET RECOGNITION AND TO
7 FREEZE ASSETS WHICH HE THINKS BELONGS TO THE
8 COMPANY, BUT HE IS INTENDING TO BRING PROCEEDINGS
9 IN THE CAYMAN ISLANDS, FOR WHICH HE NEEDS
10 SANCTION, IN ORDER TO PROVE OR ESTABLISH THAT THE
11 ASSETS DO BELONG TO THE COMPANY, YES? THE PERSON
12 CLAIMING TITLE TO THE ASSET IS THE THIRD PARTY WE
13 WERE PREVIOUSLY DISCUSSING, NOT A CONTRIBUTORY,
14 NOT A CREDITOR. THAT THIRD PARTY COULD NOT COME
15 TO THE CAYMAN COURT UNDER ANY PROVISION OF THE
16 RULES OR THE ACT, COULD HE, AND GET A DIRECTION
17 FROM THE COURT, THE CAYMAN COURT THAT IS, THAT THE
18 LIQUIDATOR SHOULD APPLY TO DISMISS THE CHAPTER 15
19 PROCEEDINGS?

20 A. I WANT TO MAKE SURE I HAVE
21 UNDERSTOOD YOUR QUESTION. SO YOU HAVE GOT A THIRD
22 PARTY.

23 Q. YES?

24 A. THE LIQUIDATOR HAS CHAPTER --
25 ACTUALLY, IT MIGHT BE EASIER IF YOU JUST REPEAT

1 YOUR QUESTION, SORRY.

2 Q. YOU KNOW SOMETIMES WHEN A
3 LIQUIDATION ORDER IS MADE, SOMETIMES THE COURT
4 WILL EXPRESSLY PROVIDE IN THE LIQUIDATION ORDER
5 THAT YOU HAVE EXPRESS POWER SANCTION TO GO AND
6 APPLY FOR CHAPTER 15.

7 A. YES.

8 Q. I AM KIND OF DOING A SLIGHT REVERSE
9 SCENARIO HERE.

10 A. OKAY.

11 Q. WE ARE BACK WITH THE THIRD PARTY,
12 NOT A CREDITOR, NOT A CONTRIBUTORY.

13 A. YES, A DEBTOR.

14 Q. WELL ----

15 A. CONTINGENT DEBTOR.

16 Q. ---- THERE IS A POT OF ASSETS AND
17 THE LIQUIDATOR SAYS THEY ARE THE COMPANY'S ASSETS.

18 A. OKAY.

19 Q. AND THE THIRD PARTY SAYS, NO, THEY
20 ARE MY ASSETS.

21 A. OKAY.

22 Q. NOW, POTENTIALLY THE THIRD PARTY
23 HAS -- THEY ARE IN A BANK ACCOUNT, OR SOMETHING,
24 IN THE US.

25 A. OKAY.

1 Q. THE LIQUIDATOR GOES TO THE US AND
2 GETS CHAPTER 15 RELIEF.

3 A. OKAY.

4 Q. AND THAT HAS THE EFFECT OF FREEZING
5 THAT POT OF ASSETS.

6 A. YES.

7 Q. IT IS STILL TO BE DETERMINED WHO
8 OWNS THIS POT OF ASSETS.

9 A. YES.

10 Q. THE LIQUIDATOR IS CONVINCED THEY
11 ARE HIS, THE THIRD PARTY IS CONVINCED THEY ARE
12 THEIRS.

13 A. MMM-HMM.

14 Q. SO THE LIQUIDATOR IS GOING TO BRING
15 PROCEEDINGS IN THE CAYMAN ISLANDS TO GET THAT
16 ISSUE DETERMINED. THE PROCEEDINGS IN THE US DOES
17 NOT MATTER.

18 A. OKAY.

19 Q. BUT HE HAS TO STILL GET SANCTION.

20 A. YES.

21 Q. AND HE HAS NOT GONE TO COURT TO GET
22 SANCTION YET.

23 A. MMM-HMM.

24 Q. BUT HE IS GOING TO.

25 A. YES.

1 Q. CAN THAT THIRD PARTY COME TO THE
2 CAYMAN COURT AND SAY YOU SHOULD DIRECT THE
3 LIQUIDATOR TO DISMISS THE CHAPTER 15 PROCEEDINGS
4 BECAUSE THOSE FROZEN ASSETS ARE MY ASSETS?

5 A. THIS IS QUITE INVOLVED FOR A
6 HYPOTHETICAL SCENARIO, BUT OFF THE TOP OF MY HEAD,
7 AND ASSUMING THAT I AM FOLLOWING YOU CORRECTLY,
8 I CANNOT THINK OF AN AVENUE FOR THAT THIRD PARTY
9 TO HAVE STANDING TO GET ANY DIRECTION FROM THE
10 CAYMAN COURT.

11 Q. A FEW SWEEP UP QUESTIONS. I AM NOT
12 GOING TO BE LONG NOW.

13 A. OKAY.

14 MR. MORRIS: MAY WE TAKE JUST A
15 FIVE-MINUTE BREAK?

16 MR. MCDONALD: YES, I WAS GOING TO
17 SUGGEST A FIVE-MINUTE BREAK.

18 MISS LEAHY: YES, SURE.

19 MR. MORRIS: AND YOU JUST HAVE FEW
20 MORE MINUTES?

21 THE COURT REPORTER: WE ARE GOING
22 OFF THE RECORD AT 15.05.

23 (A SHORT BREAK FROM 3.05 P.M. TO 3.15 P.M.)

24 THE COURT REPORTER: WE ARE BACK ON
25 THE RECORD AT 15.15.

1 BY MISS LEAHY:

2 Q. MISS PEARSON, I JUST WANT TO ASK
3 YOU A FEW QUESTIONS ABOUT YOUR EXPERIENCE IN THE
4 CAYMAN ISLANDS. I UNDERSTAND YOU WENT TO THE
5 CAYMAN ISLANDS IN 2009.

6 A. YES.

7 Q. SO YOU WERE A RELATIVELY JUNIOR
8 PRACTITIONER AT THAT STAGE?

9 A. YES.

10 Q. THAT IS WHY I AM NOT GOING TO ASK
11 YOU ABOUT YOUR INITIAL EXPERIENCE.

12 A. OKAY.

13 Q. NOW, JUST IN TERMS OF EXPERT
14 EVIDENCE AS A CAYMAN LAWYER, HOW MANY TIMES HAVE
15 YOU PROVIDED EXPERT EVIDENCE ON CAYMAN LAW?

16 A. SO FOR US PROCEEDINGS OR ----

17 Q. JUST OVERALL.

18 A. JUST RUNNING THROUGH THEM?

19 Q. YES.

20 A. FOR THE US, I THINK AROUND SIX
21 TIMES, FOR HONG KONG LITIGATION, ONCE AND FOR
22 ARBITRATION PROCEEDINGS AT LEAST TWICE.

23 Q. SO SAY TEN TIMES APPROXIMATELY?

24 A. GETTING UP THERE ----

25 Q. THERE OR THEREABOUTS?

1 A. YES.

2 Q. OF THOSE, HOW MANY CAN YOU RECALL
3 RELATED TO A RECOGNITION APPLICATION?

4 A. I THINK THE ONLY TWO RELATING TO
5 RECOGNITION ARE THE ONE IN THESE PROCEEDINGS AND
6 THE ONE IN TCA, WHICH YOU ALREADY FOUND.

7 Q. AND HAVE YOU EVER BEEN DEPOSED
8 BEFORE?

9 A. NO.

10 Q. YOU HAVE NOT BEEN DEPOSED BEFORE.
11 HAVE YOU EVER BEEN CROSS-EXAMINED BEFORE?

12 A. NO.

13 Q. THEN JUST IN TERMS OF YOUR ADVOCACY
14 EXPERIENCE, DO YOU REGULARLY ATTEND COURT IN THE
15 CAYMAN ISLANDS AS LEAD COUNSEL OR AS SOLE COUNSEL?

16 A. YES.

17 Q. AND WHAT ARE THE NATURE OF THE
18 APPLICATIONS THAT YOU DO AS LEAD OR SOLE COUNSEL?

19 A. THE MOST RECENT ONE THAT I DID WAS
20 A NORWICH PHARMACAL APPLICATION, BUT OVER THE
21 YEARS I HAVE COVERED THE WHOLE RANGE OF LITIGATION
22 AND INSOLVENCY MATTERS. SO I HAVE APPEARED ON
23 NUMEROUS WINDING UP PETITIONS. I HAVE APPEARED
24 ON, YOU KNOW, NUMEROUS HEARINGS IN THE CONTEXT OF
25 LONG-RUNNING LIQUIDATION PROCEEDINGS WHERE I HAVE

1 BEEN ACTING FOR STAKEHOLDERS.

2 Q. WHEN YOU SAY YOU APPEARED, JUST TO
3 CLARIFY, YOU ----

4 A. I AM TALKING ABOUT ME DOING THE
5 ADVOCACY. OBVIOUSLY, BECAUSE THERE IS A LOT OF
6 OTHER HEARINGS WHERE WE INSTRUCT LEADING COUNSEL
7 FROM THE UK, I WILL GO AND SIT NEXT TO COUNSEL,
8 YES.

9 Q. YES, OKAY. WHAT WAS THE LONGEST
10 HEARING THAT YOU HAVE EVER DONE THE ADVOCACY FOR?

11 MR. MORRIS: YOU MEAN IN TERMS OF
12 TIME?

13 MISS LEAHY: YES, AS IN THE NUMBER
14 OF DAYS IN COURT.

15 A. PROBABLY A DAY. YES, A DAY OR
16 LESS. I DO NOT THINK I HAVE EVER DONE ONE THAT
17 HAS BEEN LONGER THAN ONE DAY FOR, YOU KNOW, A
18 SINGLE HEARING.

19 BY MISS HEALY:

20 Q. HAVE YOU EVER MADE ANY APPLICATIONS
21 FOR STAKEHOLDERS IN THE CONTEXT OF A SOLVENT
22 LIQUIDATION, A SOLVENT OFFICIAL LIQUIDATION, JUST
23 TO BE CLEAR?

24 A. I CANNOT THINK OF ONE OFF THE TOP
25 OF MY HEAD, BUT I COULD NOT SAY FOR SURE THAT I

1 HAVE NOT.

2 Q. FAIR ENOUGH. ALSO, HENDERSON J,
3 HAVE YOU EVER APPEARED AS LEAD OR SOLE COUNSEL IN
4 FRONT OF HENDERSON J?

5 A. I HAVE CERTAINLY APPEARED WITH
6 LEADING COUNSEL BEFORE HIM. I CANNOT THINK OF A
7 TIME THAT I APPEARED AS THE ADVOCATE BEFORE HIM,
8 BUT I MAY HAVE DONE. AS I AM A SURE YOU KNOW, HE
9 RETIRED FROM THE BENCH A NUMBER OF YEARS AGO, SO
10 I AM TRYING TO REMEMBER WHAT HAPPENED A NUMBER OF
11 YEARS AGO.

12 Q. AND IN YOUR OPINION IS HE A
13 RESPECTED JURIST?

14 A. YES.

15 Q. THANK YOU. I AM GOING TO NOW ASK
16 YOU SOME FINAL QUESTIONS.

17 A. OKAY.

18 Q. YOU VERY HELPFULLY EXPLAINED
19 EARLIER THE SCOPE OF YOUR INSTRUCTIONS, BUT I JUST
20 WANT TO ASK YOU SOME QUESTIONS ABOUT YOUR TERMS OF
21 ENGAGEMENT, AND SPECIFICALLY TO BEGIN WITH WHAT
22 YOUR FEE STRUCTURE IS. BY THAT I MEAN ARE YOU
23 GETTING PAID BY THE HOUR, ARE YOU GETTING PAID A
24 FLAT FEE OR ARE YOU GETTING PAID ON SOME OTHER
25 BASIS?

1 A. I AM GETTING PAID BY THE HOUR.

2 Q. BY THE HOUR, OKAY. HAVE YOU AGREED
3 ANY FORM OF SUCCESS FEE?

4 A. NO.

5 Q. IS THAT PERMISSIBLE IN THE CAYMAN
6 ISLANDS? I SUPPOSE THIS IS US PROCEEDINGS.

7 A. WELL, IT IS BUT NOT -- I DO NOT
8 KNOW IF IT IS PERMISSIBLE, BUT IT WOULD BE HIGHLY
9 INAPPROPRIATE IN MY OPINION FOR AN EXPERT TO HAVE
10 A SUCCESS FEE.

11 Q. AND THEN LINKED TO THAT -- I KNOW
12 YOU CO-FOUNDED YOUR OWN FIRM IN MAY 2022.

13 A. YES.

14 Q. MANY CONGRATULATIONS.

15 A. THANK YOU.

16 Q. BUT PRIOR TO THAT YOU WERE A
17 PARTNER AT HARNEYS FOR A NUMBER OF YEARS?

18 A. YES.

19 Q. HARNEYS OF COURSE ARE SHANG PENG'S
20 CAYMAN ISLANDS' ATTORNEYS?

21 A. YES.

22 Q. DO YOU FEEL THAT YOU ARE
23 SUFFICIENTLY INDEPENDENT, IN LIGHT OF HOW RECENT
24 YOUR DEPARTURE FROM HARNEYS WAS, TO PROVIDE EXPERT
25 EVIDENCE IN THIS MATTER?

1 A. YES.

2 Q. I AM AFRAID I DO WANT TO GO BACK TO
3 THE BARRISTER FROM WILBERFORCE AGAIN AND JUST GET
4 SOME CLARITY ON THIS.

5 A. YES.

6 Q. WHY DID YOU INSTRUCT A BARRISTER TO
7 PREPARE THE FIRST DRAFT OF YOUR EXPERT OPINION FOR
8 YOU?

9 A. WHEN I WAS AT HARNEYS, I WAS
10 OBVIOUSLY PART OF A LARGE TEAM.

11 Q. YES.

12 A. AND WHEN I GAVE EXPERT EVIDENCE
13 THERE I WOULD GENERALLY HAVE AN ASSOCIATE PREPARE
14 THE FIRST DRAFT FOR ME. SINCE CO-FOUNDING
15 CLARITAS, I HAVE NOT YET BUILT UP A TEAM OF
16 ASSOCIATES, SO WHAT I HAVE BEEN DOING INSTEAD IS
17 RELYING ON THE LONDON BAR TO DO A LOT OF THE WORK
18 THAT IN A LARGER FIRM WOULD BE UNDERTAKEN BY AN
19 ASSOCIATE.

20 Q. AND DO YOU KNOW WHAT CALL THIS
21 PARTICULAR BARRISTER IS?

22 A. GRAEME?

23 Q. YES.

24 A. YES, HE IS VERY SENIOR. HE IS,
25 I WOULD SAY, BETWEEN 20 AND 30 YEARS CALL.

1 I CANNOT BE EXACT.

2 Q. YOU DO NOT KNOW. THAT IS FINE, DO
3 NOT WORRY. IS HE KING'S COUNSEL?

4 A. NO.

5 Q. NO. DO YOU KNOW WHETHER ANY OTHER
6 EXPERTS WERE APPROACHED BEFORE YOU TO PROVIDE AN
7 OPINION ON THIS MATTER?

8 A. I DO NOT KNOW.

9 MISS LEAHY: THANK YOU VERY, VERY
10 MUCH INDEED FOR ATTENDING TODAY, AND FOR YOUR
11 PATIENCE. WE ARE PLEASED TO SAY WE HAVE FINISHED.

12 A. OKAY. THANK YOU.

13 THE COURT REPORTER: THE DEPOSITION
14 IS CONCLUDED. OFF THE RECORD AT 15.24.

15 (THE DEPOSITION CONCLUDED AT 3.24 P.M.)

16

17

18

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25

1 CERTIFICATE OF WITNESS
2

3 I, KATHARINE LUCY BLADEN PEARSON, AM THE
4 DEPONENT IN THE FOREGOING DEPOSITION. I HAVE READ
5 THE FOREGOING DEPOSITION AND, HAVING MADE SUCH
6 CHANGES AND CORRECTIONS AS I DESIRED, I CERTIFY
7 THAT THE TRANSCRIPT IS A TRUE AND ACCURATE RECORD
8 OF MY RESPONSES TO THE QUESTIONS PUT TO ME ON 8TH
9 AUGUST, 2023.

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15 SIGNED

16 KATHARINE LUCY BLADEN PEARSON
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20 DATED THIS DAY OF 2023
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1 CERTIFICATE OF COURT REPORTER

2

3 I, AMY COLEY, ACCREDITED COURT REPORTER,

4 DO HEREBY CERTIFY THAT I TOOK THE STENOGRAPH NOTES

5 OF THE FOREGOING, AND THAT THE TRANSCRIPT THEREOF

6 IS A TRUE AND ACCURATE RECORD TRANSCRIBED TO THE

7 BEST OF MY SKILL AND ABILITY.

8

9 I FURTHER CERTIFY THAT I AM NEITHER

10 COUNSEL FOR, RELATED TO, NOR EMPLOYED BY ANY OF

11 THE PARTIES TO THE ACTION IN WHICH THE DEPOSITION

12 WAS TAKEN AND THAT I AM NOT A RELATIVE OR EMPLOYEE

13 OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES

14 HERETO, NOR FINANCIALLY OR OTHERWISE INTERESTED IN

15 THE OUTCOME OF THE ACTION.

16

17 *Amy Coley*

18 SIGNED

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AMY COLEY

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1 E R R A T A

2 (PLEASE MAKE ANY CORRECTIONS HERE,
3 NOT IN THE TRANSCRIPT)

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